Petition

81-160

No.

Office-Supreme Court, U.S.
FILED
JUL 23 1981
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

October Term, 1980

THE STATE OF MISSISSIPPI, AGRICULTURAL AND INDUSTRIAL BOARD, ET AL.,
Petitioners,

vs.

BARBARA PHILLIPS, MELVIN PHILLIPS, AND CORNELL GREEN RICE, Individually and On Behalf of a Class,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether named plaintiffs in an employment discrimination action who applied but were not hired by the defendant-employer may represent a class of persons who were allegedly deterred from applying with the defendant-employer because of its alleged racially discriminatory hiring practices.

2. Whether, in an employment discrimination class action, a federal court of appeals is bound by the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure in reviewing a district court's finding of nondiscrimination by the defendant-employer.

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No.

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THE STATE OF MISSISSIPPI, AGRICULTURAL AND INDUSTRIAL BOARD, ET AL.,
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vs.

BARBARA PHILLIPS, MELVIN PHILLIPS, AND CORNELL GREEN RICE, Individually and On Behalf of a Class,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, State of Mississippi Agricultural and Industrial Board [A & I Board], et al.,[1] respectfully pray

1. The parties to this proceeding are as follows. The petitioners are the State of Mississippi and its Agricultural and Industrial Board. During the course of this action, the Mississippi Legislature reorganized the A & I Board as the Mississippi Board of Economic Development. Miss. Code Ann. §§ 57-1-1 *et seq.* (Supp. 1980). However, this petition will refer to this agency as the A & I Board for the sake of consistency.

The respondents are Barbara Phillips, Melvin Phillips (no relation), and Cornell Green Rice, who brought this action both individually and on behalf of a plaintiff class of all blacks who applied for employment with the A & I Board and were denied employment because of their race, future black applicants, and those blacks who were deterred from applying because of the A & I Board's alleged racially discriminatory hiring practices. In addition, the Mississippi Council on Human Relations was a plaintiff in this case. However, the district court dismissed the Mississippi Council on Human Relations as a plaintiff.

that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 23, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981), and appears in the Appendix hereto as Appendix A. The April 18, 1979, report and recommendation of the United States Magistrate to the district court is unreported and appears in the Appendix hereto as Appendix B. The July 6, 1979, judgment of the district court, adopting the magistrate's report and recommendations, is unreported and appears in the Appendix hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 23, 1981, Appendix D. A timely petition for rehearing was denied on April 27, 1981, Appendix E, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RULE PROVISIONS INVOLVED

Fed. R. Civ. P. 23(a) provides:

> (a) *Prerequisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of

the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 52(a) provides in pertinent part:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

STATEMENT OF THE CASE

The A & I Board is an agency of the State of Mississippi which was created to promote industrial and agricultural development as well as tourism in the State of Mississippi. *Phillips v. Joint Legislative Committee, supra,* 637 F.2d at 1018.

In 1975, the respondents, blacks who applied for employment with the A & I Board, brought this civil rights action in federal district court alleging that the A & I Board discriminated against blacks in its hiring practices. The respondents asserted that this alleged discrimination violated the Fifth and Fourteenth Amendments to the United States Constitution, Title VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* and 42 U.S.C. §§ 2000e *et seq.* and 42 U.S.C. §§ 1981 & 1983. Thus, the respondents invoked the federal district court's jurisdiction under 28 U.S.C. §§ 1331 & 1343 and 42 U.S.C. § 2000e-5 (f)(3). The respondents brought this action as a class action on behalf of all blacks who applied or will in the future apply for employment with the A & I Board as well as all blacks who had been deterred from applying for employment with the A & I Board because of its racial composition and actual and reputed discriminatory hiring practices.

Following discovery, the district court certified a plaintiff class consisting of all blacks who had applied for employment with the A & I Board and who were denied employment because of their race.

Following a trial on the merits, the district court concluded that the respondents had failed to prove their claim of discrimination and, accordingly, dismissed the respondents' complaint. Appendices B & C.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the district court's refusal to include "deterred applicants" in the plaintiff class. 637 F.2d at 1022 & 1024.

In addition, the Fifth Circuit ruled that in reviewing the district court's finding of nondiscrimination, it was *not* bound by the "clearly erroneous" standard of review under Fed. R. Civ. P. 52(a). The Fifth Circuit went on to conclude that the district court's finding of nondiscrimination was erroneous, and it, therefore, reversed the district court on the merits of the class action against the A & I Board. 637 F.2d at 1024-27.

REASONS FOR GRANTING THE WRIT

In its opinion, the Court of Appeals for the Fifth Circuit applied two rules which significantly affect the litigation of employment discrimination actions in this country. First, the Fifth Circuit applied its "across the board" concept of class actions to allow the respondents, who had applied for employment and were not hired by the A & I Board, to represent persons who were "deterred" from applying for employment because of the A & I Board's alleged discriminatory hiring practices. This was done despite the obvious fact that the named plaintiffs had not been deterred by these employment practices and the lack

of proof in the record of any identifiable person who was, in fact, deterred from applying with the A & I Board.

Secondly, the Fifth Circuit reversed the district court's finding of nondiscrimination without applying the "clearly erroneous" standard of review mandated by Fed. R. Civ. P. 52(a).

These two holdings are at odds with this Court's decisions and the clear language of both Rule 23 and Rule 52(a).

I.

The Fifth Circuit's Across The Board Approach To Class Actions Is Contrary To The Teachings Of This Court In *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

"To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974). This principle has been applied by this Court in employment discrimination cases in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

However, the Fifth Circuit's holding below that the respondents may represent "deterred" persons violates this basic principle of class action law because the named respondents were *not*, in fact, deterred from applying from employment with the A & I Board and because there was no proof before the district court that *anyone* was deterred from applying for employment with the A & I Board.

The Fifth Circuit's rationale for reaching this result was as follows:

The district court in the A & I case concluded that it should exclude from the plaintiff class persons deterred by A & I's policies from applying there because the named plaintiffs lack any "nexus" with deterred persons. The court reasoned that, since the named plaintiffs did apply to A & I, they have no standing to represent persons whose grievance is that they have been prevented from applying.

This ground for narrowing the class is faulty as a matter of law. The argument would be sound if these plaintiffs sought to represent a class consisting *exclusively* of deterred persons; in such a case the plaintiffs would lack standing to represent the putative class, in the same sense that a high school graduate lacks standing to bring a class action challenging a high school requirement. *Payne v. Travenol Laboratories, Inc.*, 5 Cir. 1978, 565 F.2d 895, 898-99, *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); *see East Texas Motor Freight v. Rodriguez*, 1977, 431 U.S. 395, 403-04, 97 S.Ct. 1891, 1897, 52 L.Ed. 2d 453, 461-63. Here, however, the plaintiffs are members of the class they seek to represent, and the only issue is the breadth of the definition of that class. The requirement that the named plaintiffs' claims be "typical" of the claims of the class, Fed.R. Civ. P. 23 (a) (3), does not mean that all claims must be identical. Rather, a named plaintiff who has allegedly suffered from the defendant's racial discrimination may bring an "across the board" class action to represent all persons who have suffered from the same discriminatory policies, whether or not all have experienced discrimination in the same way. *Satterwhite v. City of Greenville*, 5 Cir. 1978, 578 F.2d 987, 993-94 n.8 (en banc), *vacated on other grounds*, 445 U.S. 940,

> 100 S.Ct. 1334, 63 L.Ed.2d 773 (1979); *Herbert v. Monsanto Co.*, 5 Cir. 1978, 576 F.2d 77, *vacated on other grounds*, 580 F.2d 178 (1978); *Long v. Sapp*, 5 Cir. 1974, 502 F.2d 34; *Johnson v. Georgia Highway Express*, 5 Cir. 1969, 417 F.2d 1122. Hence, we have approved the practice of allowing rejected applicants to represent classes including those deterred from applying. *E.g., Jack v. American Linen Supply Co.*, 5 Cir. 1974, 498 F.2d 122 (per curiam). Indeed, if this were not the case, most such persons would go without relief entirely, since it is unlikely that one of them would sue and qualify as a class representative.

637 F.2d at 1024. However, this rationale fails to comply with the mandate of this Court in *East Texas Motor Freight System, Inc. v. Rodriguez, supra*:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. R. Civ. P. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.

431 U.S. at 405-06.

Because the Fifth Circuit's class action ruling is in conflict with the requirements of Fed. R. Civ. P. 23 and this Court's opinion in *Rodriguez*, the Court should grant the petition for a writ of certiorari to review this question.

II.

The Fifth Circuit Erred In Refusing To Apply The "Clearly Erroneous" Standard Of Review In Reviewing The District Court's Finding Of Nondiscrimination By The A & I Board.

In reviewing the merits of the A & I Board class action, the Fifth Circuit adhered to its position that the "clearly erroneous" standard of review does not apply to its review of the district court's finding of nondiscrimination. 637 F.2d at 1024. This ruling is in conflict with the clear language of Rule 52(a) of the Federal Rules of Civil Procedure which prohibits the court of appeals from setting aside the district court's findings of fact unless they are "clearly erroneous".

This precise issue was just recently reserved by the Court for future consideration. *Texas Department of Community Affairs v. Burdine*, 450 U.S. ....., ... n.12 (1981). This issue is ripe for decision by this Court in view of the Court's recent grant of certiorari in *Swint v. Pullman-Standard*, 624 F.2d 525, 533 n.6 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3788 (U.S. Apr. 20, 1981) (Nos. 80-1190 & -1193) (certiorari granted limited to question one presented by each petition; question one in petition in number 80-1193, *United Steel Workers v. Swint* is: "is federal court of appeals bound by 'clearly erroneous' rule of Fed. R. Civ. P. 52(a) in reviewing district court's findings of fact, arrived at after lengthy trial as to motivation of parties in negotiated seniority system?" 49 U.S.L.W. at 3648).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Appendix

APPENDIX

APPENDIX A

Barbara PHILLIPS, Cornell Green Rice, Melvin Phillips, and Mississippi Council on Human Relations, a corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

The JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE AND EXPENDITURE REVIEW OF the STATE OF MISSISSIPPI et al., Defendants-Appellees.

The MISSISSIPPI COUNCIL ON HUMAN RELATIONS, a corporation, Barbara Phillips, Melvin Phillips and Cornell Green Rice, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

The BOARD OF TRUSTEES OF the INSTITUTION OF HIGHER EDUCATION a/k/a The State College Board et al., Defendants-Appellees.

Barbara PHILLIPS, Melvin Phillips and Cornell Green Rice, individually and on behalf of a class, Plaintiffs-Appellants,

v.

The STATE OF MISSISSIPPI AGRICULTURAL AND INDUSTRIAL BOARD et al., Defendants-Appellees.

Nos. 79-2131, 79-2940 and 79-3550.

United States Court of Appeals, Fifth Circuit.

Unit A

Feb. 23, 1981.

Rehearing Denied April 27, 1981.

Employment discrimination actions were brought against three state agencies. The United States District

Court for the Southern District of Mississippi, William Harold Cox and Walter L. Nixon, Jr., JJ., denied motions for recusal, denied most motions for class certification, and entered judgment on the merits in favor of the defendants and plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) evidence of statements made by district judge in prior cases involving racial discrimination did not provide basis for recusal; (2) class certification was improperly denied; (3) racial discrimination on a class basis on the part of one employer was established; and (4) racial discrimination was shown in a number of the individual cases.

Affirmed in part and reversed and remanded in part.

1. Judges (Key) 51(4)

If affidavit of recusal is timely and technically correct, its factual allegations must be taken as true; judge must pass on legal sufficiency of the affidavit but may not pass on the truth of the matters alleged. 28 U.S.C.A. § 144.

2. Judges (Key) 51(3)

Affidavit of recusal is legally sufficient if the facts are material and stated with particularity, the facts are such that they would convince a reasonable person that bias exists if they are true, and the facts show that the bias is personal as opposed to judicial in nature. 28 U.S.C.A. §§ 144, 455.

3. Judges (Key) 51(4)

Under statute requiring a judge to disqualify himself in any proceeding in which his impartiality might be reasonably questioned, judge need not accept all the allegations by moving party as true and, in fact, no motion at

all is required; the judge must disqualify himself if the facts cast doubt on his impartiality regardless of how or by whom they are drawn to his attention. 28 U.S.C.A. § 455.

4. Judges (Key) 49(1)

The alleged bias of a judge must be personal as distinguished from judicial in nature in order to require recusal. 28 U.S.C.A. §§ 144, 455.

5. Judges (Key) 49(1)

Motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases nor on a demonstrated tendency to rule in any particular way nor on any particular judicial leaning or attitude derived from his experience on the bench. 28 U.S.C.A. §§ 144, 455.

6. Judges (Key) 49(1)

The fact that a judge's remarks or behavior take place in the judicial context does not exclude them from scrutiny and from requiring recusal if they reflect such pervasive bias and prejudice as would constitute bias against one of the parties. 28 U.S.C.A. §§ 144, 455.

7. Judges (Key) 49(2)

Where most of the allegations of bias concerned the trial judge's rulings or comments on the merits in previous cases, where some of the older remarks reflecting racial reactions which were outmoded and improper were not gratuitous insults and did not show overt hostility, and where all of the allegations concerned the judge's final conclusions or immediate reactions on points of law or facts in the case before him, they did not require recusal. 28 U.S.C.A. §§ 144, 455.

8. Federal Courts (Key) 819
Judges (Key) 51(4)

Recusal motion is committed to the sound discretion of the district judge and on appeal it will be asked only whether he has abused his discretion. 28 U.S.C.A. §§ 144, 455.

9. Federal Civil Procedure (Key) 184

Where neither party could determine how many black applicants there were, let alone identify all of them, and where the class included future and deterred applicants who were necessarily unidentifiable, joinder was impracticable even if the number was small. Fed.Rules Civ.Proc. Rule 23(a)(1), 28 U.S.C.A.

10. Federal Civil Procedure (Key) 171

Requirement that the district court decide whether to certify a class in any case as soon as possible after the commencement of the action is a command to the district court, not to the parties, and the court has an obligation to make the determination on its own motion if necessary. Fed.Rules Civ.Proc. Rule 23(c)(1), 28 U.S.C.A.

11. Federal Civil Procedure (Key) 164

Fact that plaintiffs had delayed in making motion to certify the case did not show that they would be inadequate class representatives, especially where a good deal of the time had been consumed in litigating motions for change of venue and for recusal.

12. Federal Civil Procedure (Key) 171

Even if attorney for plaintiffs would be disqualified from representing the class, it does not follow that the class may not be certified; court may make certification

contingent on replacement of counsel or on severance of the individual claim of the offending class representative.

13. Federal Civil Procedure (Key) 164

Fact that one of the named plaintiffs was an attorney for the civil rights law firm representing the plaintiff, although she was not acting as an attorney in the case, did not preclude class representation on the theory that she was an inadequate representative because of a potential conflict with other class members where any attorney fees granted in the case would come directly from the defendants and not from any fund created for class relief. Civil Rights Act of 1964, § 706(k) as amended 42 U.S.C.A. § 2000e-5(k).

14. Federal Civil Procedure (Key) 184

Where named plaintiffs did not seek to represent a class consisting exclusively of persons who had been deterred from making applications because of the racial policies of the employer, but, rather, also sought to represent unsuccessful applicants, the named plaintiffs could represent the persons who had been deterred from applying.

15. Federal Courts (Key) 858

District court's finding of nondiscrimination is a determination of ultimate fact to which the clearly erroneous standard does not apply.

16. Civil Rights (Key) 44(1)

Evidence that general population of the state was 37.2% black, that total civilian work force was 29.8% black, that 31.6% of the persons registering at the state Employment Security Commission for professional jobs

were black, that 27.8% of those registering for clerical or sales jobs were black, and that the percentage of blacks at one employer was between 1.5% and 6.5% black made out a prima facie case of discrimination.

17. Civil Rights (Key) 13.11

Named plaintiffs who all had college degrees lacked constitutional standing to challenge legality of employer's educational requirements for a college degree for certain positions.

18. Civil Rights (Key) 44(1)

Evidence of disparity between number of blacks in the work force and the number of blacks hired by employer, evidence of employer's history of discrimination in not having hired a single black during its first three decades of existence, and evidence that hiring procedures relied heavily on subjective judgments of executives from personal interviews demonstrated discrimination against blacks.

19. Civil Rights (Key) 9.10

Whether subjectivity in hiring is necessary or not, subjective judgments are suspect as job qualifications when they are exercised by members of an all white executive or supervisory staff.

20. Civil Rights (Key) 46

In view of past discrimination against blacks by state agency, court should direct the agency to set goals of approximately 20% black employment, separately for clerical and nonclerical positions, should require it to undertake an aggressive campaign of recruitment and advertising to procure sufficient qualified black applications,

and should, until those goals were achieved, require that one-third of all persons hired within a predetermined six-month period for permanent clerical or nonclerical jobs be black.

21. Civil Rights (Key) 43, 44(1)

To raise a prima facie case of employment discrimination, plaintiff must show that he belongs to a racial minority, that he applied and was qualified for job which the employer was seeking applicants, that he was rejected despite his qualifications, and that the position remained open after his rejection; burden then shifts to the employer to show some legitimate, nondiscriminatory reason for the applicant's rejection; plaintiff is then afforded an opportunity to show that the employer's stated reason is, in fact, a pretext.

22. Civil Rights (Key) 44(1)

Employer bears the burden of showing a legitimate reason for rejection of minority applicant by a preponderance of the evidence.

23. Civil Rights (Key) 44(1)

Evidence of employer's belief that black applicant had taken another position did not rebut a prima facie showing of employment discrimination where the employer claimed that an immediate decision to hire the applicant had been made but the employer procrastinated for several weeks without making an offer and where the evidence showed that race was a consideration.

24. Civil Rights (Key) 44(1)

Fact that black applicant had indicated that he left his previous position because it required excessive travel

was insufficient to rebut a prima facie case of discrimination against the black applicant on the theory that he had expressed a reservation about job-related travel where the employer described the travel requirements to the applicant but did not ask him if the travel requirements would be excessive.

25. Civil Rights (Key) 44(1)

In view of evidence that it was the routine practice of the employer to make no effort to further contact "walk-in" applicants, black walk-in applicant did not establish that denial of employment was due to racial discrimination.

26. Civil Rights (Key) 44(1)

Evidence established that black applicant was not qualified for any vacant position.

27. Civil Rights (Key) 44(1)

Evidence that, during the year following black applicant's application, only one white applicant was hired for position for which the black applicant might have been qualified and that the white applicant was more qualified demonstrated that black applicant had not been discriminated against on the basis of race.

28. Civil Rights (Key) 9.10

"Vacancy" within the meaning of the *McDonnell Douglas* test need not exist on the precise day of the application; any vacancies within a reasonable time must be considered as well.

See publication Words and Phrases for other judicial constructions and definitions.

29. Civil Rights (Key) 44(1)

Evidence that white was hired as a secretary scarcely two months after black secretary applied and absence of evidence that white was more qualified established that black was discriminated against because of her race.

30. Civil Rights (Key) 44(1)

Establishment of liability on class claim of employment discrimination operates to establish a prima facie case on behalf of each member of the class.

31. Civil Rights (Key) 44(1)

Evidence that, after employer obtained necessary federal funds for position which it intended to offer black applicant, it was informed that the black applicant had moved to another city to resume her law studies and that it then abandoned its plans for the new job demonstrated that the failure to hire the black applicant was based on a belief that she was no longer interested in employment and not racial discrimination.

32. Civil Rights (Key) 44(1)

Belief that black applicants were available for employment for only a short period of time based on the fact that they took other employment did not rebut prima facie case of racial discrimination.

33. Civil Rights (Key) 38

Black applicant for a job is not required to either remain permanently unemployed or forfeit his cause of action for racial discrimination.

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Stewart & Parker, Nausead Stewart, Lawyers' Committee for Civil Rights Under Law, Jackson, Miss., McTeer, Walls, Bailey & Buck, Charles Victor McTeer, Greenville, Miss., for plaintiffs-appellants Miss. Council on Human Relations et al.

Ross, Hardies, O'Keefe, Babcock & Parsons, William Freivogel, Susan G. Litchtenfeld, Chicago, Ill., Nausead Stewart, Lawyers' Committee for Civil Rights Under Law, Jackson, Miss., for plaintiffs-appellants Barbara Phillips et al. in No. 79-3550.

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Bill Allain, Atty. Gen., Hubbard T. Saunders, IV, Sp. Asst. Atty. Gen. Jackson, Miss., James M. Ward, Sp. Counsel, Starkville, Miss., for defendants-appellees State of Miss. Agricultural and Indus. Bd. et al.

Appeals from the United States District Court for the Southern District of Mississippi.

Before WISDOM, RUBIN and SAM D. JOHNSON, Circuit Judges.

WISDOM, Circuit Judge:

These appeals concern three allied lawsuits brought against Mississippi state agencies for employment discrim-

ination. The named plaintiffs are the same in the three cases: Barbara Phillips, Melvin Phillips (not related), and Cornell Green Rice.[1] All are black. In each case the plaintiffs sought to represent a class of black job applicants.

The defendant[2] in No. 79-2940 is the Joint Legislative Committee on Performance Evaluation and Expenditure Review ("PEER"), an arm of the Mississippi legislature with power to conduct performance evaluations, investigations, and critical examinations of all expenditures by any state agency. It is composed of five members of each House. It employs a staff of about twenty research analysts and clerical workers. Its offices are in Jackson.

The defendant in No. 79-2131 is the Mississippi Agricultural and Industrial Board ("A&I"), an agency created to promote industrial and agricultural development and tourism. Its members are the Governor, the Lieutenant Governor, the Speaker of the Mississippi House, four state legislators, three other state officials, and twenty-five public members appointed by the Governor. Among its functions are approval of industrial bond issues, study and recommendation of tax exemptions for Mississippi ports and harbors, and dissemination of tourist information. The Board employs a staff of sixty to eighty persons at its main office in Jackson.

The defendant in No. 79-3550 is the Board of Trustees of the Institutions of Higher Learning (commonly known as the College Board), the governing body for Mississippi's state universities and colleges. Its members are appointed

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1. The Mississippi Council on Human Relations was an original party plaintiff in all three cases. It was dismissed for lack of a real interest in the outcome in the PEER and A&I cases.

2. In all three cases there are also individual defendants: the members of each defendant board or committee, certain staff executives, and other present and former state officers.

by the Governor. The Board employs a staff of about eighteen financial analysts and clerical workers in Jackson. This suit concerns the Board's employment practices with regard only to that staff and not to the university system generally.

All three suits were brought as class actions in the Northern District of Mississippi, alleging racial discrimination in the defendants' employment practices in violation of Title VII of the Civil Rights Act of 1964 as amended.[3] The cases were transferred to the Southern District of Mississippi under 28 U.S.C. § 1404(a) (1976). Although the PEER and A&I cases were consolidated for some preliminary purposes, the three were tried separately.[4] In the PEER and A&I cases the plaintiffs moved for the district judge's recusal. The motions were denied, and this Court refused to issue a mandamus ordering recusal of the trial judge. *In re Phillips*, No. 76-4038 (5 Cir. Nov. 19, 1976). In the PEER and College Board cases, the court refused to certify the alleged classes. In the A&I case the court certified a class of all past black unsuccessful job applicants, but refused to broaden the class to include future black applicants or persons deterred from applying by A&I's alleged discriminatory practices or reputation. After full trials on the merits, the court granted judgments for the defendants on all claims.

On appeal, the plaintiffs contend (1) that the district judge erroneously refused to recuse himself in the A&I

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3. 42 U.S.C. §§ 2000e to 2000e-17 (1976). The complaints also cited *id.* §§ 1981, 1983. The plaintiffs appeal only on the Title VII judgments.

4. The PEER and A&I cases were assigned to Hon. William Harold Cox. U.S. Magistrate John R. Countiss presided over the trials and most other proceedings in the cases. Judge Cox adopted Magistrate Countiss's findings of fact and conclusions of law. The College Board case was assigned to and tried by Hon. Walter L. Nixon, Jr.

case;[5] (2) that the court improperly refused to certify classes in the PEER and College Board cases; (3) that the court improperly narrowed the class certified in the A&I case; and (4) that the court's judgments on the merits are legally incorrect or clearly erroneous. We affirm the district court's decisions as to recusal and as to some of the individual claims. We reverse, however, as to the remaining individual claims, as to the class certification issues, and as to the merits of the class claim in the A&I case.

I. RECUSAL

Barbara Phillips, acting on behalf of her co-plaintiffs, filed an Affidavit of Personal Bias and Prejudice in the A&I case, seeking the recusal of Judge William Harold Cox. Phillips's affidavit did not state any facts relating to any bias against any of the particular plaintiffs or in favor of any of the particular defendants in the case. Rather, she attempted to show that Judge Cox is prejudiced against all blacks and that he is hostile to civil rights suits. Some of her allegations are conclusory accusations, lacking in particularity. Others recite particular judicial rulings, quotations from written opinions, and alleged remarks from the bench, in five cases over Judge Cox's nineteen-year judicial career. Phillips also recited statistics concerning the frequency with which this Court has affirmed or reversed Judge Cox's rulings in civil rights cases.

[1, 2] There are two statutes governing recusal of federal district judges. 28 U.S.C. §§ 144, 455 (1976). Section 144 provides in part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

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5. As noted, the same judge refused recusal in the PEER case as well. The plaintiffs have chosen not to appeal that decision.

> that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

If an affidavit filed under section 144 is timely and technically correct, its factual allegations must be taken as true for purposes of recusal. The judge must pass on the legal sufficiency of the affidavit, but he may not pass on the truth of the matters alleged. *Berger v. United States,* 1921, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed 481; *Parrish v. Board of Commissioners,* 5 Cir. 1975, 524 F.2d 98, 100 (en banc), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *Davis v. Board of School Commissioners,* 5 Cir. 1975, 517 F.2d 1044, 1051, *cert. denied,* 425 U.S. 944, 96 S.Ct. 1658, 48 L.Ed.2d 188 (1976); *United States v. Roca-Alvarez,* 5 Cir. 1971, 451 F.2d 843, 847-48. In *Parrish,* we stated that an affidavit is legally sufficient if it meets a three-part test:

> 1. The facts must be material and stated with particularity.
>
> 2. The facts must be such that, if true, they would convince a reasonable person that bias exists.
>
> 3. The facts must show the bias is personal, as opposed to judicial in nature.

524 F.2d at 100, quoting *United States v. Thompson,* 3 Cir. 1973, 483 F.2d 527, 528, *cert. denied,* 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1974).

[3] Congress rewrote the second statute, section 455, in 1974. Subsection (b) of that section lists a number of specific situations in which a judge must recuse himself; none apply here. Subsection (a), a more general provision, requires that

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Section 455, unlike section 144, does not stipulate a formal procedure by which it must be raised. Like section 144, however, it may be raised by motion. *Davis*, 517 F.2d at 1051. Substantively, the two statutes are quite similar, if not identical.[6]

[4-6] Under either statute, the alleged bias must be "personal", as distinguished from judicial, in nature. *Davis*, 517 F.2d at 1052; *Parrish*, 524 F.2d at 100; *Steering Committee v. Mead Corp.*, 5 Cir. 1980, 614 F.2d 958, 964-65; *United States v. Serrano*, 5 Cir. 1979, 607 F.2d 1145, 1150, *cert. denied*, 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980); *Whitehurst v. Wright*, 5 Cir. 1979, 592 F.2d 834, 837-38; *Heppele v. Johnston*, 5 Cir. 1979, 590 F.2d

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6. To the extent that there is a difference, section 455 imposes the stricter standard: a movant under section 144 must allege facts to convince a reasonable person that *bias exists*, *Parrish*, 524 F.2d at 100, while under the broader language of section 455, he must show only that a reasonable person "would *harbor doubts* about the judge's impartiality", *Potashnick v. Port City Constr. Co.*, 5 Cir. 1980, 609 F.2d 1101, 1111 (emphasis added), *cert. denied* ..... U.S. ....., 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). *See* Comment, Disqualification of Federal Judges for Bias or Prejudice, 46 U.Chi.L.Rev. 236, 243-50 (1978). *See also* Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv.L.Rev. 736, 745-50 (1973).

On the other hand, section 455, unlike section 144, does not require the judge to accept all allegations by a moving party as true. Indeed, the section requires no motion at all; the judge must disqualify himself if the facts cast doubt on his impartiality regardless of how or by whom they are drawn to his attention. *See Fredonia Broadcasting Corp. v. RCA Corp.*, 5 Cir. 1978, 569 F.2d 251, 254-57, *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1979). Section 144, by contrast, requires allegation by affidavit within a stringent time limit and allows a party only one such affidavit in any case. If a party could bind a judge by his factual allegations in a section 455 motion, free from the formal requirements and more demanding standard of proof of section 144, the result would be a virtual open season for recusal. *See* 46 U.Chi.L.Rev. at 250.

609, 613; *United States v. Archbold-Newball*, 5 Cir. 1977, 554 F.2d 665, 682, *cert. denied*, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1973). The point of the distinction is that the bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case". *United States v. Clark*, 5 Cir. 1979, 605 F.2d 939, 942 (per curiam). Thus, a motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench. *United States v. Grinnell Corp.*, 1966, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778, 793; *Berger*, 255 U.S. at 31, 41 S.Ct. at 232; *Steering Committee*, 614 F.2d at 964; *Serrano*, 607 F.2d at 1150; *Clark*, 605 F.2d at 942; *United States v. Caicedo-Asprilla*, 5 Cir. 1980, 632 F.2d 1161, 1165.[7]

[7] Here, most of Phillips's allegations concern Judge Cox's rulings or comments on the merits in previous cases. Some of them are misleadingly quoted out of context. At times, especially in some of the older instances, his remarks reflected racial reactions not only outmoded but improper. These remarks were unseemly, and we do not condone them. Nevertheless, they are not enough to require recusal. The comments alleged are not gratuitous insults and do not show overt hostility or the like; in every instance they concern the district judge's final conclusions or immediate reactions on points of fact or law in the

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7. The single fact that a judge's remarks or behavior take place in a judicial context does not exclude them from scrutiny if they reflect "such pervasive bias and prejudice . . . as would constitute bias against a party". *Davis*, 517 F.2d at 1051; *Whitehurst*, 592 F.2d at 838. *See also United States v. Ritter*, 10 Cir. 1976, 540 F.2d 463 (per curiam), *cert. denied*, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976).

case before him. We would be reluctant, in any but an extreme case, to base a disqualification order on such allegations. It is a district judge's duty to conduct trials, weigh evidence, consider the law, exercise his discretion, and reach decisions in the cases on which he sits. If he understands that a seemingly harsh comment toward a party or an attorney, or a perceived tendency to give severe sentences to some class of offenders, or an aggregate imbalance in victories for plaintiffs or defendants in a particular class of cases may subject him to a train of successful recusal motions in future cases, he may consciously or subconsciously shape his judicial actions in ways unrelated to the merits of the cases before him. Whether his conclusions in every case are the same as those that we (or these plaintiffs) would have reached is immaterial. A judge is not a computing machine, and the judicial system is not constructed so that each judge must reach the same result as all other judges in a given case. If a judge's "error" amounts to incorrect law or an abuse of discretion, appellate courts exist to correct it. Within that boundary, he not only may, but should, exercise his independent judgment on the facts and on the law. Presumably, for this attribute, among others, he was appointed. *See Serrano*, 607 F.2d at 1150-51; *United States v. Johnson*, 4 Cir. 1976, 537 F.2d 1170, 1175; *Baskin v. Brown*, 4 Cir. 1949, 174 F.2d 391, 394; B. Cardozo, The Nature of the Judicial Process 98-141 (1921); Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73-74 (R. Pound, ed., 1964); Friendly, The Courts and Social Policy; Substance and Procedure, 33 U.Miami L.Rev. 21 (1978); Advisory Committee's Note, Fed.R.Evid. 201.

We do not mean to hold that prejudice against a class, as opposed to a particular litigant, can never form the basis for recusal. *See Davis*, 517 F.2d at 1051. Nor do we say

that a clearly evinced policy of disregarding the merits in any class of cases can withstand a recusal motion. *See United States v. Thompson*, 3 Cir. 1973, 483 F.2d 527, *cert. denied*, 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1974). *See also United States v. Clements*, 5 Cir. 1981, 634 F.2d 183. But we caution against a district judge disqualifying himself on the basis of an allegation of a perceived history of rulings that a moving party dislikes. This case provides a good example of the results that might follow. Phillips's affidavit contains nothing pertaining to the parties or subject matter of the A&I case; it could be repeated, word for word, by literally any black civil rights plaintiff from now until Judge Cox's retirement. With only minor modifications, it could be used by any black party—a black criminal defendant, say. This is a type of recusal for whole classes of cases, without the constitutional safeguards that protect a judge from removal from office save by impeachment. The Constitution does not contemplate that we dispense with a judge's service on such a grand scale on any but the most compelling showing. *See Steering Committee*, 614 F.2d at 966; *Archbold-Newball*, 554 F.2d at 682; *United States v. Partin*, 5 Cir. 1977, 552 F.2d 621, 637 n.20, *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). Congress has provided another remedy for judicial intemperance. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Public Law 96-458, § 3, 96th Congress, 94 Stat. 2035, 2036 (1980), amending 28 U.S.C. § 372.

[8] We also do not suggest that Judge Cox was required *not* to recuse himself. Another judge, facing a similar question, might well decide the other way. A recusal motion is committed to the sound discretion of the district judge, and on appeal we ask only whether he has abused his discretion. *Davis*, 517 F.2d at 1052; *United States ex rel. Weinberger v. Equifax, Inc.*, 5 Cir. 1977, 557 F.2d

456, 463-64, *cert. denied*, 434 U.S. 1035, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978). We cannot say here that he has done so.

II. CLASS CERTIFICATION

The plaintiffs assert errors in all three cases concerning class certification. In the PEER case the district court refused to certify a class of unsuccessful past black applicants, future black applicants, and persons deterred from applying because of the Committee's reputation or history as an employer given to race discrimination. The court held that the purported class was not numerous enough under Fed.R.Civ.P. 23(a)(1). In the College Board case the court refused to certify a similar class on the ground that the plaintiffs did not show that they could adequately represent the class, in light of their delay in moving for class certification. In both cases the defendants assert an alternative ground for the court's refusal: an alleged conflict of interest between the plaintiffs' counsel and the purported class. The A&I case presents the issues differently. There the court certified a class of actual black applicants but refused to include future applicants and deterred persons, citing problems of numerosity, delay in moving, and lack of nexus between the named plaintiffs and the excluded persons. We find that none of the asserted reasons justify the court's decisions to refuse certification or to narrow the class certified.

A. Numerosity

The district court in the PEER case noted that the plaintiffs had met all the requisites for certification of a class under Rule 23(b)(2), except the requirement of Rule 23(a)(1) that the class be so numerous that joinder of all members is impracticable. Since PEER did not record the race of its applicants, it is impossible to tell exactly how many black applicants there were. The plaintiffs

nonetheless established at a certification hearing that there were at least 33 such applicants; there may have been many more.[8]

[9] The problem before the district court, and now before us, is not simply to say whether 33 class members are enough or too few to satisfy Rule 23(a)(1). Ample case law can be cited to show that smaller classes have been certified and larger ones denied certification for lack of numerosity. *See* 3B J. Moore & J. Kennedy, Federal Practice ¶23.05 (2d ed. 1980). Such number comparisons miss the point of the Rule. The proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors. Here, neither party can even count how many black applicants there are, let alone identify all of them. Moreover, the alleged class includes future and deterred applicants, necessarily unidentifiable. In such a case the requirement of Rule 23(a)(1) is clearly met, for "joinder of unknown individuals is certainly impracticable". *Jack v. American Linen Supply Co.*, 5 Cir. 1974, 498 F.2d 122 (per curiam); *Jones v. Diamond*, 5 Cir. 1975, 519 F.2d 1090, 1100; *see* B. Schlei & P. Grossman, Employment Discrimination Law 1095-97 (1976).

The same reasoning holds true in the A&I case, where the district court cited numerousity as a ground for ex-

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8. The defendants tentatively identified eleven unsuccessful black applicants, based on the recollection of PEER executives or on the fact that some applicants graduated from predominantly black universities or colleges. Nausead Stewart, an attorney for the plaintiffs, testified that she was personally acquainted with eight other applicants and knew them to be black. Finally, fourteen black applicants were identified by comparing PEER's applicant list with a voter registration list for the City of Jackson. The court accepted the figure 33. 3 Record at 73. There may have been many more. Any black applicant who attended an integrated college, who did not register to vote in Jackson, and who did not know Stewart would not have been identified as black.

cluding future and deterred applicants from the class certified. Moreover, aside from the inherent impracticability of joinder of such parties, there is the fact that the court did certify a class of actual applicants. It is hard to see how a class already numerous enough can become insufficiently numerous through the inclusion of an unknown number of additional members. *See Hebert v. Monsanto Co.*, 5 Cir. 1978, 576 F.2d 77, 80, *vacated on other grounds*, 580 F.2d 178 (5 Cir. 1978).

B. Delay

[10] Rule 23(c)(1) commands the district court to decide whether to certify a class in any case "as soon as practicable" after commencement of the action.[9] The district court invoked the principle of that rule in refusing to certify a class in the College Board case, finding that the plaintiffs had delayed too long in moving for class certification. This lapse, it held, warranted denial of the motion because it cast doubt on the plaintiffs' ability to represent the class adequately. *See East Texas Motor Freight v. Rodriguez*, 1977, 431 U.S. 395, 404-05, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453, 463. Similarly, the court cited delay as a reason for narrowing the class in the A&I case.[10]

[11] We think the court went too far in both cases. Neither *East Texas Motor Freight* nor any other precedent

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9. Rule 23(c)(1) is cast as a command to the district court, not the parties; hence, a district court has an obligation to make the determination on its own motion if necessary. *Gore v. Turner*, 5 Cir. 1977, 563 F.2d 159, 165; *United States v. United States Steel Corp.*, 5 Cir. 1975, 520 F.2d 1043, 1052, *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976); *Garrett v. City of Hamtramck*, 6 Cir. 1974, 503 F.2d 1236, 1243; *Castro v. Beecher*, 1 Cir. 1972, 459 F.2d 725, 731.

10. This, of course, is inconsistent with the court's certification of the narrowed class in the A&I case. Since we conclude that delay would not justify a complete refusal to certify either the lesser or the greater class, we need not decide how best to resolve the inconsistency.

that we have found has held that delay in moving for certification is sufficient in itself to disqualify a party as a class representative. The case would be different if the plaintiffs' motion had been untimely under an applicable local rule, but here there was no such rule.[11] Although the plaintiffs doubtless could have been more diligent in making their motion, in the circumstances of these cases we do not think their delay was so inexcusable as to render their representation inadequate. The record reflects that a good deal of the time was consumed in litigating the defendants' motions in all three cases for a change of venue, the plaintiffs' motions in two cases for recusal, and the plaintiffs' attempt to obtain mandamus relief in this Court on the recusal issue. The rest of the time was spent in extensive discovery, much of which was relevant to the class certification question. Accordingly, we find that the district court was too draconian in refusing certification on this ground.

C. Conflict of Interest

[12] The defendants in the PEER and College Board cases raise another ground for noncertification, one not relied on by the district court.[12] This Court has adopted a per se rule under Canon 9 of the Code of Professional Responsibility[13] that an attorney who is the partner or spouse of a named class representative is disqualified from acting as counsel for the class. *Zylstra v. Safeway Stores, Inc.*, 5

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11. S.D.Miss. Local Rule 18, requiring that plaintiffs move for class certification within 45 days of the filing of the last answer, had not been adopted at the time of trial.

12. The district court has expressly rejected this contention in a related case. *Mississippi Council on Human Relations v. Mississippi Dept. of Justice*, Civil No. J76-118(R) (S.D.Miss.) (Opinion of June 18, 1980, on motion to disqualify counsel).

13. "A lawyer should avoid even the appearance of professional impropriety."

Cir. 1978, 578 F.2d 102, following *Kramer v. Scientific Control Corp.*, 3 Cir. 1976, 534 F.2d 1085, *cert. denied*, 429 U.S. 830, 97 S.Ct. 90, 50 L.Ed.2d 94 (1976). In the PEER and College Board cases, counsel for the plaintiffs are the Lawyers' Committee for Civil Rights Under Law and two of its attorneys. Barbara Phillips, one of the three named plaintiffs in the two cases, is one of the attorneys for the Lawyers' Committee (although she is not acting as an attorney in these cases). Accordingly, the defendants argue, if the class were certified the Lawyers' Committee would be disqualified as counsel. For that reason, they say the plaintiffs are not adequate class representatives under Rule 23(a)(4).[14]

[13] Although we agree wholeheartedly with the rule announced in *Zylstra* and *Kramer*, we hold that it does not apply here. Our holding in *Zylstra* is an exception to our general rejection of per se rules under Canon 9 in *Woods v. Covington County Bank*, 5 Cir. 1976, 537 F.2d 804. The *Zylstra* rule is directed at a particular ethical problem: the potential conflict that arises when a class representative stands (or appears to stand) to gain financially from an award of attorney's fees made out of a class fund. Put simply, the cause for concern is that the class representa-

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14. The defendants' attempted use of the *Kramer-Zylstra* rule requires something of a leap in logic. *Kramer* and *Zylstra* both involved motions to disqualify counsel. Each of the cases before us, by contrast, involves a contention that a would-be class representative should not be allowed to serve. As the *Kramer* Court noted, the issues raised in the two contexts are "related, but not identical. . . . [One] relates to who may serve as class representative, while the [other] relates to who may serve as counsel." 534 F.2d at 1088. Supposing that the Lawyers' Committee is disqualified from representing the class under *Zylstra*, it does not necessarily follow that the class may not be certified. For example, the district court could make certification contingent on replacement of counsel or on severance of the individual claim of the offending class representative. We need not reach this problem, however, since we hold that the Lawyers' Committee may properly represent the classes.

tive may be too generous with the class's money in granting a fee to his own partner or spouse. *See Zylstra,* 578 F.2d at 104; *Kramer,* 534 F.2d at 1089-90, 1091; *id.* at 1093 (Rosenn, J., concurring). Here the problem does not arise. Any attorney's fee granted in these cases will come directly from the defendants under 42 U.S.C. § 2000e-5(k) (1976), and not from any fund created for class relief; hence, Ms. Phillips would never have the opportunity for overgenerosity.

D. Nexus

[14] The district court in the A&I case concluded that it should exclude from the plaintiff class persons deterred by A&I's policies from applying there because the named plaintiffs lack any "nexus" with deterred persons. The court reasoned that, since the named plaintiffs did apply to A&I, they have no standing to represent persons whose grievance is that they have been prevented from applying.

This ground for narrowing the class is faulty as a matter of law. The argument would be sound if these plaintiffs sought to represent a class consisting *exclusively* of deterred persons; in such a case the plaintiffs would lack standing to represent the putative class, in the same sense that a high school graduate lacks standing to bring a class action challenging a high school requirement. *Payne v. Travenol Laboratories, Inc.,* 5 Cir. 1978, 565 F.2d 895, 898-99, *cert. denied,* 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); *see East Texas Motor Freight v. Rodriguez,* 1977, 431 U.S. 395, 403-04, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453, 461-63. Here, however, the plaintiffs are members of the class they seek to represent, and the only issue is the breath of the definition of that class. The requirement that the named plaintiffs' claims be "typical" of the claims of the class,

Fed.R.Civ.P. 23(a)(3), does not mean that all claims must be identical. Rather, a named plaintiff who has allegedly suffered from the defendant's racial discrimination may bring an "across the board" class action to represent all persons who have suffered from the same discriminatory policies, whether or not all have experienced discrimination in the same way. *Satterwhite v. City of Greenville,* 5 Cir. 1978, 578 F.2d 987, 993-94 n.8 (en banc), *vacated on other grounds,* 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed 2d 773 (1979), *Hebert v. Monsanto Co.,* 5 Cir. 1978, 576 F.2d 77, *vacated on other grounds,* 580 F.2d 178 (1978); *Long v. Sapp,* 5 Cir. 1974, 502 F.2d 34; *Johnson v. Georgia Highway Express,* 5 Cir. 1969, 417 F.2d 1122. Hence, we have approved the practice of allowing rejected applicants to represent classes including those deterred from applying. *E. g., Jack v. American Linen Supply Co.,* 5 Cir. 1974, 498 F.2d 122 (per curiam). Indeed, if this were not the case, most such persons would go without relief entirely, since it is unlikely that one of them would sue and qualify as a class representative.

Because the district court erred in refusing to certify any class in the PEER and College Board cases, we remand them for trial as to the class allegations.[15] The A&I case went to trial as a class action. It does not appear that the court's error in restricting the class scope could have affected the trial in any important way. We therefore reach the class merits in that case.

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15. Despite counsel's statement to the contrary, it is apparent from the record that the court in each case conducted the trial solely as an action on the named plaintiffs' individual claims, and that evidence pertaining to class allegations was excluded. PEER Transcript at 17-18; College Board Transcript at 21, 44, 49. We therefore decline to reach the class merits of these cases.

III. THE MERITS: THE A&I CLASS ACTION

[15] In reviewing the merits of the case as to alleged class discrimination, we keep in mind that the district court's finding of nondiscrimination is a determination of ultimate fact to which the "clearly erroneous" standard of review does not apply. (We are bound, of course, by the district court's findings of subsidiary fact and judgments of credibility unless they are clearly erroneous.) Fed.R.Civ. P. 52(a); *Williams v. Tallahassee Motors, Inc.*, 5 Cir. 1979, 607 F.2d 689, 690; *East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332, 338-39; *Causey v. Ford Motor Co.*, 5 Cir. 1975, 516 F.2d 416, 420-21.

The record indicates that the A&I Board employed no blacks from its inception in 1942 through 1972. In 1973 the first black was hired to form and head a new subunit, the Office of Minority Business Enterprise (OMBE). According to a stipulated set of employee lists, the Board employed five blacks in December 1974 (7.9 percent of the Board's total); eleven blacks in December 1975 (12.0 percent); fifteen blacks in December 1976 (17.6 percent); and thirteen blacks in 1977 (12.5 percent). These figures are skewed, however, by the inclusion of the OMBE staff and short-term employees hired under the federal Comprehensive Employment and Training Act (CETA).[16] Both programs derive most of their funds from federal sources. OMBE has its own hiring procedure, separate from the rest of the Board.[17] Its staff has always been

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16. Pub.L.No.93-203, 87 Stat. 839 (1973), later codified at 29 U.S.C. §§ 801 to 999 (Supp. III 1979).

17. There is much dispute between the parties as to whether OMBE is really "part of" A&I. The point is unimportant. Thomas Espy, the OMBE director, did all the hiring for OMBE (subject to the approval of the executive director), while Harold Cross,

(Continued on following page)

all or nearly all black. The record does not reflect how CETA employees are hired, but their positions are temporary. The CETA program is subject to closer federal scrutiny as to equal employment practices than is A&I's employment generally. Excluding these persons, the figures are much lower; one black (1.5 percent) in 1974; one black (1.4 percent) in 1975; seven blacks (9.5 percent) in 1976; and six blacks (6.5 percent) in 1977. Even these statistics hide another key fact: although roughly half of the Board's staff is professional, technical or managerial, A&I has never hired a black permanent employee (outside of OMBE) for anything but a clerical position.

Most of the real debate between the parties concerns the relevant labor market to which A&I's hiring statistics are to be compared.[18] Actual applicant flow, often the

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Footnote continued—

administrative assistant to the executive director, hired the staff for all other parts of A&I (likewise subject to approval). Thus, whether or not OMBE is operationally part of A&I, we cannot consider it as all of a piece with the rest of the Board for purposes of evaluating the fairness of A&I's hiring procedures.

18. Besides the problem of which demographic measurement best suits the case, there is disagreement as to the proper geographical area. Here, perhaps, is where a purely numerical analysis fails most visibly. There is never any ascertainable demarcation line showing from where a particular employer can or cannot draw employees. Whether a potential employee will commute or relocate to take a job depends not only on his personal tastes, but also on the types of work he does, prevailing economic conditions, the features of the two communities concerned, and any number of other factors. Moreover, the problem is inevitably complicated by the effect of the employer's own recruiting and hiring practices. *See generally Hazelwood School District v. United States*, 1977, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768.

In this case, the parties dispute whether the proper area is the entire state or only the Jackson Standard Metropolitan Statistical Area. The relevant figures, however, are remarkably close for both areas in nearly all important measures. The only substantial difference is that blacks make up a higher fraction of applicants for white collar jobs (professional, technical, managerial, clerical, and sales) in the Jackson area than in the state at large.

best measurement, is unavailable here because A&I does not identify its applicants by race. Other statistical measures are necessarily imperfect in differing ways and varying degrees. The best the court can do is to accept what figures are available; allow for imperfections, skewing factors, and margins of error; and then take the figures for what they are worth. Sometimes this is much, sometimes little. *See United Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396, 418; *Williams*, 607 F.2d at 693; *Hester v. Southern Ry.*, 5 Cir. 1974, 497 F.2d 1374, 1379-81.

[16] The general population of Mississippi was 37.2 percent black at the time of the 1970 census. According to figures from the Mississippi Employment Security Commission, the total civilian work force was 29.8 percent black in 1977. In February 1978, 31.6 percent of persons registering at that Commission for professional, technical, or managerial employment were black; 27.8 percent of registrants for clerical or sales jobs were black. Although these statistics have their flaws, we think the disparity between them and the Board's hiring record is sufficient to raise a prima facie case of class discrimination and to shift the burden to the Board to show that the discrepancy results from other causes. *Robinson v. Union Carbide Corp.*, 5 Cir. 1976, 538 F.2d 652, 659-61, *modified on other grounds*, 544 F.2d 1258 (5 Cir. 1977), *cert. denied*, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977).

[17] A&I's only substantial response is to point out that only 11.5 percent of all high school graduates in the Mississippi work force were black (as of 1973, the latest year for which figures are in evidence).[19] This is material,

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19. Actually, the defendants state that 14.9 percent of such graduates are black. Appellees' Brief at 12. This is due to the Board's misreading of the M.E.S.C. table, Plaintiffs' Exhibit 32 at table 6: what that table states is that 14.9 percent of Mississippi

(Continued on following page)

but, by itself, it is insufficient. Many of A&I's clerical positions do not require a high school diploma, according to the Board's own job descriptions. Moreover, almost all of the nonclerical positions require a college degree; blacks made up 18.1 percent of the Mississippi work force with degrees. Considered against the figure for A&I's black nonclerical hiring—zero, outside of OMBE—that figure does much to deflate the rebuttal argument.[20]

[18, 19] Even so, we might hesitate to find discrimination in this case on the basis of these statistics alone. Here, however, there are other indicators. The district court found that A&I has a clear history of discrimination, not having hired a single black during its first three decades of existence. Its hiring procedures rely heavily on the subjective judgments of its executives from personal interviews, a procedure that can easily be used to mask racially motivated hiring decisions.[21] Such facts can buttress sta-

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Footnote continued—

blacks in the labor force are high school graduates. The error becomes more serious with regard to college graduates: the Board reports that only 3.7 percent of Mississippi college graduates are black, but a little long division shows that the correct figure is 18.1 percent.

20. Because the named plaintiffs all have college degrees, they lack constitutional standing to challenge the legality of A&I's educational requirements under *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, and *Scott v. City of Anniston*, 5 Cir. 1979, 597 F.2d 897, *cert. denied*, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980). *See Payne v. Travenol Laboratories, Inc.*, 5 Cir. 1978, 565 F.2d 895, 898-99, *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978). Accordingly, that issue is not presented in these cases, either here or in the district court.

21. To note this fact is not necessarily to find fault with A&I's procedure or job criteria. In fact, the Board's bulky set of job descriptions is about as detailed and specific as can reasonably be expected. Given the nature of A&I's work, some subjectivity in hiring is unavoidable, especially with regard to nonclerical positions. Whether necessary or not, however, subjective judgments are suspect as job qualifications when they are exercised by members of an all-white executive or supervisory staff. *See Jenkins v. Caddo-Bossier Ass'n for Retarded Children*, 5 Cir. 1978, 570 F.2d 1227, 1229 (per curiam).

tistical evidence by suggesting a qualitative explanation for a quantitative result.

[20] In light of these facts, as found by the district court and amply supported by the record, we conclude that the district court erred in its conclusion of nondiscrimination against the class. On remand, the district court should direct the Board to set goals of about twenty percent black employment outside OMBE, separately for clerical and nonclerical positions. A&I should undertake an aggressive campaign of recruitment and advertisement to procure sufficient qualified black applicants to make these goals feasible. Further, until these goals are achieved, one third of all persons hired within predetermined six-month periods for permanent clerical or nonclerical jobs outside OMBE shall be black. The district court shall take any other concurrent or later actions necessary to eliminate the effects of past discrimination at A&I and to procure the rights of the plaintiff class and its members. *See Morrow v. Crisler*, 5 Cir. 1974, 491 F.2d 1053 (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1979); *Franks v. Bowman Transportation Co.*, 5 Cir. 1974, 495 F.2d 398, 418-20, *rev'd in part on other grounds*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *NAACP v. Allen*, 5 Cir. 1974, 493 F.2d 614; *Davis v. County of Los Angeles*, 9 Cir. 1977, 566 F.2d 1334, 1342-44, *vacated as moot*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979); *United States v. City of Chicago*, 7 Cir. 1977, 549 F.2d 415, 436-37, *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1978); *Boston Chapter, NAACP, Inc. v. Beecher*, 1 Cir. 1974, 504 F.2d 1017, 1026-28, *cert. denied*, 421 U.S. 910, 96 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *United States v. Masonry Contractors Ass'n*, 6 Cir. 1974, 497 F.2d 871, 877; *Erie Human Relations Commission v. Tullio*, 3 Cir. 1974, 493 F.2d 371; *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission*, 2 Cir. 1973,

482 F.2d 1333, 1339-41, *cert. denied*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); *Carter v. Gallagher*, 8 Cir. 1971, 452 F.2d 315, 330-31 (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972).

IV. THE MERITS: THE INDIVIDUAL CLAIMS

[21, 22] The standard and order of proof in an individual claim under Title VII are by now familiar. To raise a prima facie case, the plaintiff must show (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open. The burden then shifts to the employer to show some legitimate, nondiscriminatory reason for the applicant's rejection.[22] The plaintiff is then afforded a fair opportunity to show that the employer's stated reason is in fact a pretext. *McDonnell Douglas Corp. v. Green*, 1973, 422 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; *Furnco Construction Co. v. Waters*, 1978, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957. This formula must not be applied mechanically, but flexibly, with a view toward the particular hiring procedures and factual situation presented. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Peters v. Jefferson Chemical Co.*, 5 Cir. 1975, 516 F.2d 447, 450. On

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22. This Court has consistently held that the employer bears the burden of showing his legitimate reason by a preponderance of the evidence. *Burdine v. Texas Department of Community Affairs*, 5 Cir. 1979, 608 F.2d 563, 567; *Turner v. Texas Instruments, Inc.*, 5 Cir. 1977, 555 F.2d 1251, 1255; *Whiting v. Jackson State University*, 5 Cir. 1980, 616 F.2d 116, 121; *Jefferies v. Harris County Community Action Ass'n*, 5 Cir. 1980, 625 F.2d 1025, 1030. The Supreme Court has granted certiorari on the question, however. *Texas Department of Community Affairs v. Burdine*, 447 U.S. 920, 100 S.Ct. 3009, 65 L.Ed.2d 1112 (1980). We, of course, adhere to the Fifth Circuit rule pending the Supreme Court's decision, but it is not a matter of importance; under our view of the cases, none of the nine individual claims present turn on the applicability or nonapplicability of the *Burdine* rule.

appellate review, we are bound by the district court's findings of credibility and of subsidiary fact unless they are clearly erroneous. The clear error standard, however, does not apply to the ultimate conclusion of discrimination or nondiscrimination. *Williams v. Tallahassee Motors, Inc.*, 5 Cir. 1979, 607 F.2d 689, 690; *East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332, 338-39; *Causey v. Ford Motor Co.*, 5 Cir. 1975, 516 F.2d 416, 420-21.

A. The PEER Case

[23] 1. *Barbara Phillips.* Barbara Phillips applied to the PEER Committee on July 12, 1974. She had interviews with John Hamilton, the Director of the Committee staff, and John Turcotte, a staff auditor. Both men testified that they were very favorably impressed with Phillips's credentials, her manner, and her knowledge of PEER's functions.[23] At their request, she brought in a writing sample. The two men decided right away to hire Phillips, but they did not inform her of that. After the initial interview, Phillips was never told that she was under serious consideration.[24] Three weeks after their interview with her, Hamilton and Turcotte saw reports on television and in a newspaper that Ms. Phillips had filed EEOC complaints against PEER and other agencies and that she was acting as a consultant to the Mississippi Council on Human Relations.[25] The district court found that she would have been hired but for these news reports. Hence, it concluded, PEER established a legitimate reason for not hir-

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23. Transcript at 114, 188-89, 397-98. Usually we do not give transcript and record citations. We make an exception in this case for the convenience of this Court, should there be a petition for a rehearing en banc, and for the convenience of the Supreme Court, should there be an application for a writ of certiorari.

24. Transcript at 128, 188, 345, 400.

25. Transcript at 114-16, 128, 430-31.

ing Phillips—Hamilton's and Turcotte's beliefs that she was already employed. The court also held that Phillips had not shown that reason to be a pretext.[26]

After carefully examining the record, we believe that this finding is clearly erroneous. The defendant's theory fails because it cannot adequately explain why, if Hamilton and Turcotte were so impressed with Ms. Phillips's qualifications that they decided immediately to hire her, they procrastinated for several weeks. In fact, the record shows that race was very much on their minds. Hamilton testified that hiring Phillips was "an important decision" because she would have been the first black employee at PEER. He and Turcotte were concerned about the reaction of the white legislators on the Committee and the white staff to such a step, as well as Phillips's own reaction to the "alien world" of the white-dominated agency. The reason for the delay, both men testified, was that they were mulling over the "significance" or "complexities" of hiring blacks at PEER.[27] One need not question the good faith of Hamilton and Turcotte to conclude that the ultimate decision not to hire Ms. Phillips was as much due to her race as was the delay in offering her a position. Given their enthusiasm for her qualifications, it is hard to believe that they would not have at least inquired as to the possibility of hiring her away from her "consulting" position but for their apprehensions about her race.[28] We do not mean to say that Title VII always requires an employer to pursue black applicants even after they are hired elsewhere. We hold only that, on the record in this case, we cannot avoid the conclusion that the reason offered was a convenient

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26. Record at 676-77.

27. Transcript at 113, 118-19, 128-29, 144, 346-47, 362; *see id.* at 210, 262-63.

28. Her position was, in fact, unpaid. Transcript at 224-25.

way out of an uncomfortable decision—in other words, a pretext.

[24] 2. *Melvin Phillips.* Melvin Phillips applied to PEER on August 30, 1974. John Turcotte interviewed him. When he called back the next day he was told that there were no openings. The district court found that Turcotte rejected Mr. Phillips because he had expressed a reservation during the interview about job-related travel.[29]

This finding is clearly erroneous. There is literally no evidence that Mr. Phillips said in his interview that he was unwilling to travel. On the contrary: although Turcotte testified that he had told Phillips about the travel requirements of the job, he was certain that Phillips had not expressed any reservation about them.[30]

Presumably, what the district court had in mind was Mr. Phillips's statement on his employment application that he had left his last job because it required excessive travel[31] Turcotte testified that it was this expression of reluctance that had led to the decision not to hire Phillips.[32] If this was indeed the reason for the rejection, it is insufficient as a matter of law to rebut Phillips's prima facie case. Turcotte's reason was, at best, a bare assumption about Phillips's intentions at the time of his application—an assumption made all the more unreasonable by Phillips's silence about the travel requirements Turcotte described to him and Turcotte's failure to ask the obvious question. We have held that an unchecked assumption that an ap-

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29. Record at 672. The court also noted that the next person hired, Susan Hymel, was better qualified than Phillips. This is immaterial, since Turcotte testified that the hiring of Hymel was not at all connected with the rejection of Phillips. Transcript at 441.

30. Transcript at 463-64.

31. Defendants' Exhibit 2; *see* Transcript at 327.

32. Transcript at 412, 415.

plicant would not accept a job cannot be a legitimate reason for failing to offer the job, or at least to make inquiry about the assumption. *Davis v. Jackson County Port Authority*, 5 Cir. 1980, 611 F.2d 577. Here, in fact, Phillips testified that he had not said anything about travel because he was unemployed and needed the job to support his family. He later took a job requiring travel.[33]

3. *Cornell Green Rice.* On September 19, 1974, Cornell Rice visited PEER's offices to apply for a clerical or secretarial job. She left a completed (although unsigned) application form with a receptionist, but she did not speak with anyone else or set up an interview. She never called back or made any further effort to keep in contact with PEER.

[25] The district court found that Rice did not make out a prima facie case because there were no vacancies for which she was qualified. This is probably incorrect.[34] Even so, it is clear from the record that the defendants showed a valid, nondiscriminatory reason for not hiring Rice. According to the uncontradicted testimony of Turcotte and Hamilton, it was routine practice at PEER to make no effort to make further contact with "walk-in" applicants—those who do nothing more than leave or mail in a resume or application form.[35] Rice's attempt to impeach this explanation by counterexample only reinforced it.[36] It is not for us to say whether this procedure is sen-

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33. Transcript at 331, 483.

34. As we shall discuss later, a vacancy within the meaning of the *McDonnell Douglas* test does not mean only an opening existing at the precise date of application, but any opening during the time that the application remains active. The record shows that two white secretaries were hired within two months of Rice's application. Record at 185-86.

35. Transcript at 178-79, 454-55; *see id.* at 135.

36. Transcript at 452-55.

sible, or even fair; it is sufficient for our purposes that it is race-neutral and that it has not been shown to be pretextual. Accordingly, we decline to disturb the district court's ruling on this claim.

B. The College Board Case

1. *Barbara Phillips.* On July 9, 1974, Barbara Phillips went to the receptionist's desk on the first floor of the building in which the Board's offices are located. She took an application form home, filled it out, and mailed it in. Ten days later, Dr. E. E. Thrash, the Board's executive director, sent her a letter stating that there were no vacancies for a person of Phillips's qualifications.

[26] We find no clear error in the district court's finding that Ms. Phillips was not qualified for any vacant position. The Board employs a staff of about 18 persons; most of its work concerns the financial problems of Mississippi higher education. Thrash testified that he rejected Phillips because there was nothing in her application to suggest that she had any experience or expertise in financial matters or in higher education.[37] Her education had been in history and in law, proficiency at which would not qualify her for any of the Board's professional positions.[38] Nor did she appear to be qualified for most clerical jobs, since she left blank the space on her application for typing and shorthand skills.[39] She was qualified, Thrash testified, for the position of file clerk, but that job has not been open since before 1974.[40] We believe that this evidence provides adequate support for the district court's ruling.

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37. Transcript at 72, 76, 94; Plaintiffs' Exhibit 13.

38. Transcript at 72-74, 76, 94, 98. The Board handles none of its own legal work. *Id.* at 94-95.

39. Plaintiffs' Exhibit 13; Transcript at 72, 79.

40. Transcript at 74, 79.

2. *Melvin Phillips.* Melvin Phillips testified that he went to the College Board on September 6, 1974. A receptionist informed him that there were no application forms, but he had an informal interview with Charles Coffman, an associate director. Coffman, Phillips said, told him that there were no openings then and that there were no positions for persons with B.A. degrees.[41]

The district court rejected Mr. Phillips's testimony and found that he had not applied to the Board. This was error. This finding rests on a misreading of Coffman's testimony; indeed, the parties stipulated in the pretrial order that Phillips did apply.[42]

[27] Despite this discrepancy, we affirm the district court's ruling. Examination of the record reveals that, during the year following Mr. Phillips's application, only one white applicant was hired in a position that Phillips might have filled. That one, Ward Shaw, had a master's degree in economics and experience as a college instructor. He was hired on a temporary basis to do a study of the feasibility of certain proposed program additions at Alcorn State University, a job for which he was better qualified than Phillips.[43] Given this absence of any relevant vacancies, we must agree that Phillips did not make out a prima facie case of racial discrimination.

3. *Cornell Green Rice.* Cornell Rice interviewed with Thrash on September 19, 1974. He told her that there were no jobs open then and would be none in the foresee-

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41. Transcript at 213-15.

42. Record at 735. Coffman did not testify that he never interviewed Mr. Phillips, but only that he did not recall doing so. He pointed out that he interviews many applicants and easily might not remember one in particular. Transcript at 265-66.

43. Plaintiffs' Exhibit 4; Transcript at 77, 96-97.

able future. She left her resume and application. She never heard from the Board.[44]

[28, 29] The district court found that Rice was not hired because there were no vacancies when she applied.[45] This is clearly erroneous. The evidence shows that Bonnie Childers, a white, was hired as a secretary scarcely two months after Rice's application.[46] The defense made no attempt to show that Childers was better qualified than Rice, and there is no indication of how long the vacancy she filled had existed.[47] A vacancy, within the meaning of the *McDonnell Douglas* test, need not exist on the precise day of application; any vacancies within a reasonable time must be considered as well.[48] *McLean v. Phillips-Ramsey, Inc.*, 9 Cir. 1980, 624 F.2d 70, 72 (per curiam); *Neely v. City of Grenada*, 1977, N.D.Miss., 438 F.Supp. 390, 409; *see East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332, 338. Since no attempt was made to show a legitimate reason for hiring Childers instead of Rice, we hold that Rice is entitled to judgment.

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44. Transcript at 227-28.

45. Record at 920. The court also adverted to testimony that Robert Harrison, a black member of the Board, had approached Rice about working at the Board and that Rice had said she was not interested. It is not clear how much the court relied on that fact, but any reliance would have been misplaced. The evidence shows that, when Harrison approached Rice, she was earning more than the Board would pay. At the time of her application, by contrast, she was unemployed. Transcript at 137-40, 227.

46. Plaintiffs' Exhibit 4.

47. Childers's application is in the record, Record at 392, but it is not obvious that her credentials or experience exceed Rice's. She was not mentioned at trial. Through an apparent clerical error, the departure date for the person Childers replaced is plainly misreported. Record at 559, 569.

48. There is at least one example on the record, occurring a few months before Rice's application, of a white applicant being hired months after applying. Plaintiffs' Exhibit 3 (Martha D'Aquino).

C. The A & I Case

[30] The individual claims in the A & I case come to us in a different posture from those in the other two cases because of our holding that the plaintiffs proved that A & I is guilty of discrimination against the plaintiff class.[49] The establishment of liability on the class claim operates to establish a prima facie case on behalf of each member of the class. Once the individual plaintiff proves that he applied unsuccessfully, the burden shifts to the employer to establish that its failure to hire that individual was the result of legitimate nondiscriminatory reasons. *International Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 357-62, 97 S.Ct. 1843, 1865-68, 52 L.Ed.2d 396, 428-32; *Franks v. Bowman Transportation Co.*, 1976, 424 U.S. 747, 771-73 & n.32, 96 S.Ct. 1251, 96 S.Ct. 1267-68 & n.32, 47 L.Ed.2d 444, 466-67.

[31] 1. *Barbara Phillips.* Barbara Phillips visited the A & I Board during July 1974. She testified that she was interviewed by Harold Cross, administrative assistant to the director, but other evidence shows (and the district court found) that Phillips actually spoke with Robert Robinson, the executive director.[50] Robinson testified that he was very impressed with Phillips's credentials and intelligence, but that he had no positions at that time suitable for her. He offered to assist her in obtaining a job at another agency. At the same time, however, he described to her a new position that he wanted to create in the Industrial Department, for which he thought Phillips would be well suited. He took two telephone numbers

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49. We also note that in this case, unlike the other two, there is no claim for backpay or other money relief. The complaint is expressly limited to a cause of action for injunctive and declaratory relief, and neither party introduced any evidence as to the propriety or amount of backpay awards.

50. Record at 456; Transcript at 58, 145-46, 160-62.

for her and asked her to check back. Over the next three weeks Robinson worked at arranging federal funds for the new position. When he succeeded, he called Phillips's telephone number to speak to her about the job. At one there was no answer; at the other, he was told that Phillips had moved to Chicago to resume her law school studies at Northwestern University. He abandoned his plans for the new job.[51]

The district court credited Robinson's testimony and found that the sole reason why Phillips was not hired was because Robinson believed she was no longer interested in employment in Jackson. There is abundant evidence to support this finding. In light of the facts, it is not clear that Phillips was rejected at all. Even if she was, we agree with the district court that Robinson's testimony adequately established a legitimate, nondiscriminatory reason for the rejection.[52]

2. *Melvin Phillips.* Melvin Phillips applied at the A & I Board on August 28, 1974. After filling out an application, he spoke briefly with Harold Cross. Cross said there were no jobs available in A & I, but referred him to Thomas Espy, head of OMBE. Espy also had no jobs. Phillips called Espy a few times, but he never heard from A & I again.[53]

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51. Transcript at 160-62, 164.

52. This holding is not in conflict with *Davis v. Jackson County Port Authority*, 5 Cir. 1980, 611 F.2d 577, or our holding on Melvin Phillips's claim in the PEER case. In those cases the employers jumped to unwarranted conclusions while foregoing obvious opportunities to ask about them. The difference here is simply a matter of reasonableness; there is a point at which Title VII does not require an employer otherwise acting in good faith to verify every possible logical assumption on which he might rely. We are influenced in this determination by Robinson's remarkable efforts to create a position for Phillips when he found none available.

53. Transcript at 72-80.

[32, 33] The district court held against Phillips because, it concluded, he was only available for employment for a short period of time, and all white applicants hired during that period were better qualified than he.[54] We think that the court improperly constricted its scrutiny of the Board's hiring. Title VII does not require a plaintiff to remain permanently unemployed or forfeit his cause of action for racial discrimination. Nor can the Board contend here, as it did in the case of Barbara Phillips, that Phillips's apparent departure from the job market was a legitimate reason for not hiring him, for there is no evidence that anyone at A & I ever learned that he had taken another job. According to A & I's own written procedures and Cross's testimony, applicants remain under active consideration for all openings within a year of the date of application.[55] During the year following Phillips's application, A & I hired seventeen non-clerical employees, fourteen of whom were white. Excluding OMBE and temporary CETA appointments, they hired four such persons, all white.[56] A & I's failure to show a legitimate business reason for hiring these persons instead of Phillips is fatal to its defense.

3. *Cornell Green Rice.* Cornell Rice applied at A & I on September 18, 1974, and interviewed briefly with Espy. He said he would refer her application "upstairs" (i. e., to A & I). She later received a letter from Espy advising her that there were no jobs available.[57]

Rice's case is similar to Melvin Phillips's. The district court ruled against Rice because it found that she had been available for employment for only a few days, and

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54. Record at 458-59.

55. Plaintiffs' Exhibit 18; Transcript at 87-88, 150-51.

56. Plaintiffs' Exhibit 8.

57. Plaintiffs' Exhibit 1; Transcript at 23-27, 47-48.

there were no secretarial or clerical vacancies during that time. Again, though, there was no suggestion that Rice's application was removed from consideration prematurely, for no one at A & I knew of her new job. During the year following her application, A & I hired nineteen whites and six blacks in clerical jobs. If OMBE and CETA jobs are excluded, the figures are nine white, one black.[58] As with Melvin Phillips, the absence of any business justification for these hirings defeats the Board's rebuttal of the prima facie case established under *Franks* and *Teamsters*.

SUMMARY

To summarize our disposition of these cases:

We AFFIRM the judgment in the A & I case with regard to the issue of recusal.

We REVERSE the district court's refusal to certify the alleged classes in the PEER and College Board cases. Those cases are REMANDED for appropriate proceedings as to the administration of the class action and the merits of the class allegations. We MODIFY the class certification order in the A & I case to include in that class future applicants and persons deterred from applying for jobs with A & I.

We REVERSE the judgment in the A & I case that the plaintiffs did not establish discrimination against the class. The case is REMANDED for appropriate relief consistent with this opinion.

We REVERSE the court's judgments on the merits with respect to Barbara Phillips's individual claim in the PEER case; Melvin Phillips's individual claims in the PEER and A & I cases; and Cornell Rice's individual claims

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58. Plaintiffs' Exhibit 8.

in the A & I and College Board cases. We REMAND the cases for appropriate relief. We AFFIRM the district court's judgments as to the remaining individual claims.

Although we have refused to overturn the district court's denial of the plaintiffs' recusal motion, in light of later developments and all of the circumstances presented in these cases, we suggest that any proceedings on remand should be heard before a judge other than the Hon. William Harold Cox. We do so without in any way questioning the integrity or impartiality of that Judge; we act solely in the interest of preserving the complete appearance of impartiality. *See Webbe v. McGhie Land Title Co.*, 10 Cir. 1977, 549 F.2d 1358, 1361; *Eckles v. Sharman*, 10 Cir. 1977, 548 F.2d 905, 911; *United States v. Bray*, 10 Cir. 1976, 546 F.2d 851, 860; *United States v. Ritter*, 10 Cir. 1976, 540 F.2d 459, 464-65, *cert. denied*, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976).

APPENDIX B

(Filed April 18, 1979)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J76-117(C)

BARBARA PHIILLIPS, et al
PLAINTIFFS

VS.

THE STATE OF MISSISSIPPI AGRICULTURAL
AND INDUSTRIAL BOARD, et al
DEFENDANTS

OPINION

This is the second in a line of cases instituted by the named plaintiffs against agencies of the State of Mississippi alleging racially discriminatory hiring practices.

This action is founded upon charges of racial discrimination in the hiring practices and policies of the Agricultural and Industrial Board, an agency of the State of Mississippi whose purpose is to promote economic development, in violation of 42 U.S.C. 1981, 1983, 2000(d) and 2000(e), the Fifth and Fourteenth Amendments.

The complaint in this case was filed by Mississippi Council on Human Relations on behalf of the named plaintiffs, but the Council was dismissed by order of this court on June 23, 1976, as having no real interest in the outcome of this litigation. The individual plaintiffs are members of the black race, who, in the summer and fall of 1974,

sought employment with the A & I Board. The class plaintiffs are certified to be:

> All blacks who have previously applied for employment with the Agricultural and Industrial Board and have been denied such right prior to this date solely because they were and are black.

The defendants are the State of Mississippi, the Agricultural Board of the State of Mississippi, Mike Amis, present director of the A & I Board, and the Honorable Cliff Finch, present Governor of the State of Mississippi. Defendants Amis and Finch were substituted pursuant to F.R. Civ. P. 25(d)(1) in the place of Dr. Robert L. Robinson, the former director of the A & I Board, and the Honorable William L. Waller, the former Governor of the State of Mississippi. At the trial of this cause the plaintiffs dismissed all claims against Robinson and Waller, and dismissed all claims for monetary relief against Amis and Finch in their individual capacities.

Cornell Green Rice during the summer of 1974 was employed as a temporary secretary with the Lawyers' Committee for Civil Rights Under Law. Her summer employment coming to an end, she sought out Michael Raff with the Mississippi Council on Human Relations for information on job openings. Mr. Raff, who had done a study of black representation in various state agencies, recommended to Mrs. Rice several agencies with which she might apply, including the A & I Board. Raff also gave Mrs. Rice $50.00 to assist her during the period she was seeking employment. On September 18 Mrs. Rice appeared at the A & I Board offices and submitted her application for a position as "secretary or any other position for which I qualify."

Mrs. Rice's application stated that she had a B.S. degree in Business Education, five years secretarial-clerical

experience, and five years experience as a teacher of business subjects at the high school level. Her typing skills were 75 words per minute and shorthand skills were 55 words per minute. She had a personal interview with Thomas Espy, the director of the Office of Minority Business Enterprise (OMBE), a department of the A & I Board. It was Mrs. Rice's testimony that Espy informed her that no secretarial positions were then available, but that he expected some openings in the near future. He told her he would arrange for her to take the classification examination and that she would be notified when to appear for the test. She was never notified about the test, nor did she ever contact Espy to follow up on her application.

The following day, September 19, Mrs. Rice applied at seven other state agencies recommended by Raff. While talking with various persons at the Research and Development Center, she heard that the Mississippi Family Health Center was seeking secretarial help. She submitted her application at the Health Center that same day, was hired and began work in October 1974.

In the summer of 1974 Barbara Phillips had completed one year of law school at Northwestern University in Chicago and was working during the summer months for the Delta Ministry, a civil rights organization. Miss Phillips contemplated working the following year rather than returning to shool, and consulted with Michael Raff about possible job openings. As with Mrs. Rice, Raff suggested to Miss Phillips several state agencies which had few or no black employees, and gave her $50.00 to purchase clothing for the interviews. During July Miss Phillips submitted her application to the A & I Board, seeking a position as an editorial or research assistant. It was her testimony that she was interviewed by Harold Cross, but Mr. Cross denied this, and Miss Phillips did not recog-

nize him in the courtroom. It appears that Miss Phillips was in fact interviewed by Dr. Robert Robinson, the Executive Director of the A & I Board, as Dr. Robinson testified.

Dr. Robinson testified that he was quite impressed with Miss Phillips, but informed her that very little research and writing was done in any A & I Board position, and suggested that she apply with the R & D Center, which employs a number of research assistants. Although there was no opening at the A & I Board at the time, Dr. Robinson thought Miss Phillips might be quite effective in a back-up position with the Industrial Department, where some research was done. He suggested she check with him on a regular basis for the next few weeks. In approximately four weeks Dr. Robinson thought he would soon be able to utilize Miss Phillips and attempted to contact her at two telephone numbers listed on her application form. At one number, he received no answer. At the other, he was told that Miss Phillips had returned to Chicago to re-enter law school. The position being created for Miss Phillips was abandoned and never filled.

Melvin Phillips applied with the A & I Board on August 28, 1974. At the time he was employed with American Friends Service Committee compiling research on Title I and special education information, conducting workshops and assisting in surveys. His application shows that he had also worked with a federally-funded project of the Tri-County Community Center, acting as liaison between community and school, mediating in school disciplinary problems. He held a B.S. degree in political science. Mr. Phillips had also received $50.00 from Michael Raff and suggestions about various state agencies where he might submit his application. In addition, he also applied with private businesses and sought assistance from a private employment agency. In mid-September he was hired

as Parent Involvement Coordinator with the Community Education Extension Service.

No blacks were employed by the A & I Board before 1973, when Thomas Espy was hired to establish and direct OMBE. During the years 1974, 1975 and 1976, approximately 65-70 blacks applied for employment at the A & I Board; 17 blacks were hired. In 1974, the A & I Board had 63 employees: 58 (92%) white, 5 (8%) black. In 1975, the Board had 92 employees: 81 (88%) white, 11 (12%) black. In 1976, the Board had 81 employees: 70 (86.5%) white, 11 (13.5%) black. The ratio has remained to date at the 1976 level or above.

To prevail, plaintiffs must first establish a prima facie case of discrimination as outlined in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), that is, they must show that they are members of a racial minority, that they applied and were qualified for jobs for which the employer was seeking applicants, that despite their qualifications they were rejected, and that after their rejection, the position remained open and the employer continued to seek applicants from persons of plaintiffs' qualifications. The burden then shifts to the employer to articulate legitimate, nondiscriminatory reasons for their rejection. If the employer can make such a showing by the preponderance of the evidence, the burden is then upon the plaintiffs to show, also by a preponderance of the evidence, the defendants' reason to be a pretext for discrimination. See also, *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977).

Barbara Phillips was available for employment from mid-July until the end of August; Melvin Phillips between August 28 and mid-September; Cornell Rice for a few days in mid-September. Between July 1 and October 1, 1974, only four persons were hired by the A & I Board: Linda

Lambert, a white receptionist, hired August 1; Royce B. Culpepper, white, hired September 1 as Manager of the Brussels office; Dorothy J. Lambert, white, hired September 16 as Manager of Travel and Tourism; George Norfleet, white, hired September 17 as mail clerk.

When Linda Lambert was hired, only Barbara Phillips had sought employment with the A & I Board. She did not seek a clerical position, and, therefore, Linda Lambert displaced none of the plaintiffs. No other positions were open while Miss Phillips was still living in Mississippi.

When Royce Culpepper, Dorothy Lambert and George Norfleet were hired, only Melvin Phillips was available for employment. Dr. Robinson indicated that these persons were better qualified for their positions than was Mr. Phillips. Culpepper is bilingual, had lived in Brussels for several years while in military service, and had experience in industrial development and world trade. Dorothy Lambert had 20 years experience in marketing, advertising and sales. George Norfleet was hired as mail clerk after lengthy experience with Western Union. No additional employees were hired until December 1974 when a black secretary and a black deputy director began work with the Board. There was no position of any kind open when Mrs. Rice made application with the Board.

The Court is of the opinion and so finds that Miss Phillips and Mrs. Rice failed to make a prima facie case, in that they failed to show that they applied for jobs for which the employer was seeking applicants and which remained open after their rejection. As for Mr. Phillips, legitimate nondiscriminatory reasons for the hiring of other applicants have been enunciated by the defendants. All three persons hired had considerable experience in related fields which they could bring to their positions with the A & I Board. Although defendants admit that Mr. Phillips

was minimally qualified, it has been shown that others were better qualified. Mr. Phillips has failed to show defendants' explanation to be a pretext for discrimination.

Statistics from the 1970 census introduced by the plaintiffs indicate that 37% of the population of the State of Mississippi is black. Other tables from the Mississippi Employment Security Commission introduced by the plaintiffs show that in the unemployed population, 16 years and older, 41.7% of the white population and 9.6% of the black population are experienced in the white collar occupations (the category applicable to the A & I Board). Dr. Max H. McDaniel, an expert witness in the field of statistics, testified that of the total number of Mississippi residents holding high school diplomas, 14% are black. This is in accord with 1970 census statistics. All positions at the A & I Board, save one, laborer, have a minimum high school education requirement. This requirement is not challenged here for job-relatedness.

While it is apparent from the record that blacks were discriminated against by the A & I Board in its hiring practices prior to 1973, it is also clear that affirmative efforts to rectify past discrimination have been made. The hiring practices of the A & I Board since 1974 have not had a disparate impact upon the applicable black work force minimally qualified for positions with the board. Title VII does not impose upon an employer the duty to employ unqualified persons or to favor a minority group [*Griggs v. Duke Power Company*, 401 U.S. 431, 91 S.Ct 849 (1971); 42 U.S.C. §2000e-2(j)], but simply to implement nondiscriminatory hiring practices which have no disparate impact on minority hiring. *Hester v. Southern Railway*, 497 F.2d 1374 (5th Cir. 1974). The court is of the opinion and so finds that since 1973 the A & I Board has engaged in nondiscriminatory hiring practices which had, by 1975,

rectified racial disparities in its employee population. It is not argued, nor is there any reason to believe, that these nondiscriminatory hiring practices will be altered if this court fails to grant injunctive relief on behalf of the class.

There is no merit to plaintiffs' contention that black employees of the A & I Board were virtually segregated by placement in OMBE rather than placement throughout A & I departments. The exhibit introduced by plaintiffs (P-8) which gives the name, race, sex, date of hire, position and salary of all employees of the A & I Board during the years here involved, does not support this contention. Of the 18 black employees working at the A & I Board between 1974 and 1976, four are indicated to be OMBE employees, three more worked both within and without OMBE at various times, and the remainder are not shown to have been associated with OMBE at any time.

For the above and foregoing reasons, the Court is of the opinion and so finds that neither the individual nor the class plaintiffs have established by a preponderance of the evidence that they were not offered employment with the A & I Board because they were black or that the hiring policies and practices of the Board have a disparate impact upon the black population of Mississippi. The Court, therefore, finds for the defendants.

An order will be prepared in accordance with this opinion and submitted to the Court within the time prescribed by the rules.

/s/ John R. Countiss III
United States Magistrate

Jackson, Mississippi
April 12, 1979

APPENDIX C

(Filed July 6, 1979)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J76-117(C)

BARBARA PHILLIPS, MELVIN PHILLIPS AND
CORNELL GREEN RICE, INDIVIDUALLY AND
ON BEHALF OF A CLASS*
PLAINTIFFS

V.

THE STATE OF MISSISSIPPI, ET AL
DEFENDANTS

JUDGMENT

This suit was instituted against the defendants charging them with not hiring the plaintiffs solely because they were black. This matter was properly referred to the United States Magistrate who heard the case in great detail.

The Magistrate filed an opinion in the form of Findings of Fact and a Recommendation to this Court on this record dated April 12, 1979. The file nowhere indicates that any notice was given to members of the class to afford them an opportunity to request exclusion of the class as

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*The class consists of all blacks who have previously applied for employment with the Agricultural & Industrial Board and have been denied such right prior to this date solely because they were black.

provided by Civil Rule 23(c) of the Rules of Federal Procedure, and no adjudication against them will be provided.

This Court has carefully read and considered the two transcripts of extensive testimony and has considered the stipulations of the parties (which are few) and has considered the depositions and the answers to interrogatories propounded by the parties. The parties were afforded an opportunity before the Magistrate to object to his findings and conclusions, and this Court has examined and considered those objections and is convinced that they are immaterial and shed no convincing light on the main issue in this case.

The sole issue before the Magistrate and up for consideration by this Court is as to whether or not these defendants intentionally discriminated against black citizens just because they were black. Barbara Phillips applied for a job which was not open at the time and she was asked to leave her telephone number. She left two numbers; one telephone did not answer and the other telephone said that Barbara Phillips was in school in Chicago. It may be seriously doubted that Barbara Phillips honestly and sincerely wanted a job. She was paid $50 by a priest to apply for certain jobs at companies who had no black employees.

The plaintiffs filed this suit at Greenville, Mississippi on December 10, 1975 and have picked up two additional lawyers in its transit here. It is strange, indeed, when ten lawyers have been working on this case for so long and yet have not offered any substantial proof of any just claim against the A&I Board which was their principal objective. This A&I Board was created as a Governor's plum and has largely operated at the whim and caprice of the Governor in power during his tenure. The Administrative Assistant to the Director of the A&I Board testified: "Dr. Robinson

(Director of the A&I Board) had directed me on numerous occasions, as he had staff members in my presence, to actually seek black applicants to the A&I Board, and seek opportunities by which they could obtain black staff members among the ranks of the A&I Board." R126. Nobody could truthfully, honestly and sincerely state that such an attitude had always prevailed with this Board, but this Court is considering facts and circumstances as they have existed since 1973.

The extremely large battery of able lawyers representing these plaintiffs have certainly dismally failed to show in this record any intent on behalf of the defendants to discriminate against competent black applicants just because they were black. The pretrial order, agreed to by the parties on March 20, 1979, showed that Dr. Sidney Richmond, Mortician of Prentiss, Mississippi, was appointed as a member of the Board on July 27, 1976. On the same date, Charles Evers, Fayette, Mississippi, was appointed and likewise was Dr. Walter Washington, President of Alcorn College. Those distinguished citizens are all black. It was agreed that the burden of proof was on the plaintiffs to establish their alleged discrimination, and that they must show intent to discriminate between competent black people to establish their claim.

The Magistrate in this case has carefully, patiently and properly accorded these plaintiffs all of their constitutional rights. The plaintiffs in this case surely made out a prima facie claim against the defendants, and the defendants just as surely and just as convincingly answered each one of their contentions; and it thereupon became and was the duty of the plaintiffs to show by a preponderance of the evidence that their claim had merit.

The Court has carefully examined and considered all of the items of proof contained in this very large record.

Such examination and consideration of the record in this case before this Court leads to the inescapable conclusion that these plaintiffs have failed to establish their case by the greater weight of the more convincing evidence and proof.

Accordingly, this Court accepts, adopts and approves the Findings and Recommendations of the Magistrate, dated April 12, 1979; and this Court accordingly adjudges that the complaint of these plaintiffs is without merit and is now finally dismissed with prejudice at the cost of the named plaintiffs to be taxed by the Clerk of this Court and for which proper process may issue.

ORDERED AND ADJUDGED, this July 6, A.D., 1979.

/s/ Harold Cox
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 793550

D. C. Docket No. CA-J76-117 & 114 (c)

BARBARA PHILLIPS, MELVIN PHILLIPS and
CORNELL GREEN RICE, Individually and on
behalf of a class,
Plaintiffs-Appellants,

versus

THE STATE OF MISSISSIPPI AGRICULTURAL and
INDUSTRIAL BOARD, ET. AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi

Before WISDOM, RUBIN and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; and that this cause be and the same is hereby reversed and remanded in part to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants the costs on appeal, to be taxed by the Clerk of this Court.

February 23, 1981

ISSUED AS MANDATE:

APPENDIX E

(Filed April 27, 1981)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Nos. 79-2131, 79-2940, 79-3550

UNIT A

Barbara PHILLIPS, Cornell Green Rice, Melvin Phillips, and Mississippi Council on Human Relations, a corporation, individually and on behalf of all other similarly situated, Plaintiffs-Appellants,

v.

The JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE AND EXPENDITURE REVIEW OF the STATE OF MISSISSIPPI et al., Defendants-Appellees.

The MISSISSIPPI COUNCIL ON HUMAN RELATIONS, a corporation, Barbara Phillips and Cornell Green Rice, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

The BOARD OF TRUSTEES OF the INSTITUTION OF HIGHER EDUCATION a/k/a The State College Board et al., Defendants-Appellees.

Barbara PHILLIPS, Melvin Phillips and Cornell Green Rice, individually and on behalf of a class, Plaintiffs-Appellants,

v.

The STATE OF MISSISSIPPI AGRICULTURAL AND INDUSTRIAL BOARD et al., Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING

(April 27, 1981)

Before WISDOM, RUBIN and SAM D. JOHNSON, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin

United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

Opposition

Office-Supreme Court, U.S.
FILED
AUG 31 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-160

THE STATE OF MISSISSIPPI, AGRICULTURAL AND INDUSTRIAL BOARD, ET AL.,

Petitioners,

vs.

BARBARA PHILLIPS, MELVIN PHILLIPS, AND CORNELL GREEN RICE, Individually and on Behalf of a Class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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La Salle Street Press — Chicago Printed in U.S.A.

QUESTIONS PRESENTED

1. Whether persons who were deterred from applying for employment with the defendant-employer because of its racially discriminatory hiring practices should be included as part of the class in a class action lawsuit against the defendant-employer where the named representatives are past applicants and there is no challenge to the class being comprised of past and future applicants.

2. Whether, in an employment discrimination lawsuit, a federal court of appeals is bound by the "clearly erroneous" rule of Rule 52(a) of the Federal Rules of Civil Procedure in reviewing a district court's finding of nondiscrimination by the defendant-employer.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-160

THE STATE OF MISSISSIPPI, AGRICULTURAL AND INDUSTRIAL BOARD, ET AL.,

Petitioners,

vs.

BARBARA PHILLIPS, MELVIN PHILLIPS, AND CORNELL GREEN RICE, Individually and on Behalf of a Class,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the Fifth Circuit's opinion in this case. The opinion is reported at 637 F.2d 1014.

ADDITIONAL OPINIONS BELOW

The July 6, 1979 judgment of the district court, contained in petitioners' petition for writ of certiorari as Appendix C, was amended by the district court by order of September 17, 1979. The September 17, 1979 order of the district court

is unreported and appears in the Appendix hereto as Appendix A.

On January 5, 1979, Magistrate Countiss,* after an evidentiary hearing on plaintiffs' class action motion, certified a class of "all blacks who have unsuccessfully applied for employment with the Board, all blacks who will in the future apply for employment with the Board, and all blacks who have been deterred from applying for employment with the Board because of its racial composition or actual or reputed discriminatory hiring practices." Magistrate Countiss' order was given from the bench and is unreported. Magistrate Countiss' order appears at pages 83 through 86 in the transcript of the proceeding, which appears in the Appendix hereto as Appendix B.

On February 7, 1979, the district court reversed in part the decision of the magistrate, which ordered a class of past, future and deterred applicants, by limiting the plaintiff class to all blacks who had previously applied for employment with the A & I Board** and were denied such right prior to February 7, 1979 solely because they were black. The February 7, 1979 order of the district court is unreported and appears in the Appendix hereto as Appendix C. This order is referred to in petitioners' statement of the case.

To give this Court a better flavor for the quality of this case's handling at the district court level, we attach as Appendix D the original judgment order of Judge Cox

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* On November 2, 1976, the district court judge, William Harold Cox, assigned the case to United States Magistrate John R. Countiss, as a special master. Thereafter all motions and the trial were held before Magistrate Countiss who made reports and recommendations to district court Judge Cox who thereafter entered his orders and opinions on the motions and the trial.

** The petitioner, Agricultural and Industrial Board, is referred to herein as the "A & I Board" or the "Board".

regarding disposition of this case on the merits, filed on June 8, 1981. This order was inexplicably withdrawn and substituted by the judgment of July 6, 1979, which is Appendix C to petitioners' petition for writ of certiorari.

ADDITIONAL STATEMENT OF THE CASE

The Class

Magistrate Countiss, after an evidentiary hearing, certified a class of past, future and deterred applicants to the A & I Board. On defendant's motion, Judge Cox limited the class to past applicants. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the district court's refusal to include deterred and future applicants in the plaintiff class. 637 F.2d 1014, 1021-1024. Petitioners are now objecting to the inclusion of deterred applicants in the class, but raise no objection to the inclusion of past or future applicants in the plaintiff class.

The A & I Board's Hiring Practices

The A & I Board employed no blacks from its inception in 1942 through 1972. In 1973 the first black was hired to form and head a new sub-unit, the Office of Minority and Business Enterprises ("OMBE"). OMBE's staff has always been all or nearly all black. OMBE is federally funded, and federal regulations provide that federal funds will be withdrawn if discrimination in hiring for such programs exists. OMBE's hiring procedure is separate from the rest of the A & I Board. Excluding the OMBE employees, very few blacks have ever been employed by the A & I Board: one black was employed in 1974 (1.5%); one black was employed in 1975 (1.4%); seven blacks were employed in 1976 (9.5%); and six blacks were employed in 1977 (6.5%). And, while roughly half of the A & I Board's staff are in professional, technical or managerial positions, the A & I

Board has never hired a black permanent employee (outside of federally funded OMBE) for anything but a clerical position. 637 F.2d 1014, 1025.

The Fifth Circuit compared the A & I Board's employment record with the facts that the general population of Mississippi was 37.2% black at the time of the 1970 census, that the total civilian work force was 29.8% black in 1977 and that in February, 1978, 31.6% of the persons registering at the Mississippi Employment Securities Commission for professional, technical or managerial jobs were black and 27.8% of the registrants for clerical or sales jobs were black, and held that the disparity between these statistics and the A & I Board's hiring record was sufficient to raise a prima facie case of class discrimination which the A & I Board failed to rebute. 637 F.2d 1014, 1025-1026. The accuracy of the foregoing statistics, being derived from a Mississippi state agency's records, was not challenged at trial.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Class Issue.

In support of their position that actual applicants cannot represent a sub-class of deterred applicants, petitioners cite only *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), *East Texas Motor Freight System* v. *Rodriguez*, 431 U.S. 395 (1977), and Rule 23 of the Federal Rules of Civil Procedure. A careful reading of each fails to disclose anything inconsistent with the Fifth Circuit's disposition of the class issue in this case.

Neither case cited by petitioners discusses the scope of a class once the named plaintiffs are determined to be proper class representatives. Nor does Rule 23 of the Federal Rules of Civil Procedure support petitioners'

argument. Indeed, petitioners' attempt to restrict the class is at variance with the policies underlying Federal Rule of Civil Procedure 23, especially in view of the importance of the class action in eliminating widespread racial discrimination. Once the requirements of a class are met, the class should be defined so as to effect relief for *all* of its members.

Even *assuming arguendo* that petitioners' argument that the class should exclude deterred applicants has merit, this Court should not grant certiorari on this issue because a decision by this Court to restrict the class to past and future applicants would have absolutely no effect on the injunctive relief ordered by the Fifth Circuit Court of Appeals.

2. The Rule 52(a)—"Clearly Erroneous" Issue.

Regardless of the procedural status and eventual outcome of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. (1981) and *Swint* v. *Pullman-Standard Co.*, 624 F.2d 525 (5th Cir.), *cert. granted*, 49 U.S.L.W. 3788 (1981), they can have no effect on the outcome of this case.

The conduct of petitioners' over the 40 years of A & I Board history is a caricature of racial discrimination in hiring which would compel an identical outcome regardless of the standard employed. Recall, no blacks were employed by the Board in its first thirty years. Then, a handful of blacks were employed in clerical positions. And, with the onset of the federally funded OMBE program, the Board hired blacks, virtually exclusively, to staff and run the federally funded OMBE program. (Evidently the A & I Board believed that by hiring all blacks for OMBE it would not jeopardize its federal funding.) Although the A & I Board consists of half clerical and half non-clerical (i.e., management), it has *never* hired a black for a non-clerical

(management) position except for its virtually all black, federally funded OMBE program.

The egregious and transparently cynical nature of the A & I Board's uncontradicted hiring conduct make this a case uniquely *unfit* for inclusion in any reexamination of the application of Rule 52(a) to discrimination cases. Here, the outcome would be the same regardless of the standard to be employed.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

APPENDIX A
(Filed September 17, 1979)

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BARBARA PHILLIPS, ET AL., Plaintiffs v. THE STATE OF MISSISSIPPI, AGRICULTURAL AND INDUSTRIAL BOARD, ET AL., Defendants.	Civil Action No. J76-117(C)

ORDER

This civil action came on for hearing on the motion of the defendants to alter and/or amend the judgment entered in this action on July 6, 1979, to provide that said judgment does adjudicate the rights of the members of the class certified in this action, and the court, having considered said motion, the arguments of counsel, and being advised that the plaintiffs do not oppose said motion, does find that the defendants' Motion to Alter and/or Amend Judgment is well taken and should, therefore, be granted.

It is, therefore, ORDERED AND ADJUDGED

1. That the defendants' Motion to Alter and/or Amend Judgment be, and it hereby is, granted; and

2. That the second paragraph of the judgment heretofore entered in this action on July 6, 1979, be, and

it hereby is, altered and amended to read in its entirety as follows:

> The Magistrate filed an opinion in the form of Findings of Fact and a Recommendation to this Court on this record dated April 12, 1979.

SO ORDERED AND ADJUDGED, this, the 17 day of September, 1979.

/s/ Harold Cox
United States District Judge

APPROVED AS TO FORM:

/s/ Nausead Stewart
Nausead Stewart
Attorney for Plaintiffs

/s/ Hubbard T. Saunders, IV
Hubbard T. Saunders, IV
Special Assistant Attorney General
Attorney for Defendants

APPENDIX B

(Pages 83-86 of transcript of hearing on class action motion before Magistrate John R. Countiss on January 5, 1979)

By the Court:

If I felt it were necessary, I would allow you to. All right? We're here simply on a motion to certify a class, and that's all we're on, not here to pass on the merits of the class. In determining whether or not the class is so numerous that we can't join all of them and whether questions of law are, in fact, common to the class, there's no doubt that there are questions of law and fact common to the class. The claims and defenses are typical of the claims and defenses of the class. I have no trouble with the representative parties fairly and adequately protecting the interest of the class, and I see no antagonistic interest between the individual plaintiffs and the proposed class, which brings us to the numerosity requirement of Rule 23.

Now, the proposed class is all blacks who have unsuccessfully applied for employment with the Board. This was amended by counsel for the plaintiff at the hearing here at my suggestion, and I think that would be a more proper class, and that is the class which the Court will consider as far as numerosity is concerned. The number of blacks who will in the future apply for employment with the Board and all blacks who have been deterred from applying for employment with the Board because of its racial composition and actual or reputed discriminatory hiring policies is incapable of determination. By its very nature, it's incapable of determination.

It appears to the Court that there is no doubt that these 74 applicants applied and were rejected, as shown by Exhibit 2 in this hearing here today. They are located throughout the State of Mississippi and not here in Jackson and,

therefore, in the Court's opinion, are impractical for joinder. From the statements by counsel, it would appear that there's a disproportionate number of blacks presently hired by the A & I Board, as compared with the percentage of the population here in Hinds County, which is approximately 37 percent. Considering the defendants' argument at best, it would show a 15 percent percentage of blacks presently employed, and approximately half of that, if as the plaintiffs assert, those federally-funded employees, should be excluded from the applicable percentage of employment.

The plaintiff, Barbara Phillips, of course, was a black applicant—an unsuccessful black applicant who has a sufficient nexus with the proposed class to represent the class, as do the other two plaintiffs, Melvin Phillips and Cornell Green Rice—Melvin Phillips, a black male; Cornell Green Rice, a black female.

The Court finds that the counsel for the plaintiffs are qualified and experienced in civil rights litigation, able to conduct the proposed litigation. There's no relief sought by the plaintiffs which is antagonistic to any interest of the members of the class. The Court will certify a class. An order may be drawn certifying a class of all blacks who have unsuccessfully applied for employment with the Board, all blacks who will in the future apply for employment with the Board, and all blacks who have been deterred from applying for employment with the Board because of its racial composition or actual or reputed discriminatory hiring practices. The proposed class is drawn in the conjunctive there, and I'm going to make it in the disjunctive.

All right, gentlemen, we stand in recess. I want to see all counsel in chambers.

[COURT RECESSED.]

* * *

APPENDIX C
(Filed February 7, 1979)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. J76-117(C)

BARBARA PHILLIPS, CORNELL GREEN RICE, AND MELVIN PHILLIPS

Plaintiffs

V.

THE STATE OF MISSISSIPPI, AGRICULTURAL AND INDUSTRIAL BOARD, ET AL

Defendants

The defendants appeal here from an adverse ruling of the United States Magistrate on a request for class certification. The Magistrate entered an order which granted certification to the plaintiffs to represent all blacks who have applied for employment with the A&I Board, all blacks who will in the future apply for employment with the A&I Board, and all blacks who have been deterred from applying for employment with the A&I Board because of its alleged racial composition, and alleged actual and reputed discriminatory hiring practices. The burden rests squarely upon these plaintiffs to prove their ability and their right to represent these parties in such class action.

This action was filed in this Court on December 10, 1975. This motion of the plaintiffs was filed here on November 3, 1977. A vast amount of time has past with nothing whatever being done or accomplished in behalf of these putative litigants.

The objections to the ruling of the Magistrate has now been answered by the plaintiffs and there is simply and literally nothing before this Court to show, or support any right or determination that these plaintiffs have any right or any interest, or any ability to adequately and properly, and conscientiously to represent any blacks who will or may apply for employment with the A&I Board, or any blacks who may have been deterred from applying for employment with the A&I Board because of any racial composition, or any actual or reputed discriminatory hiring practices. There is no showing as to any numerosity of such parties, and this Court finds and adjudges that there are none. There is no showing as to any right or standing of these plaintiffs to represent said parties who will, or may in the future apply to the Board for employment, or who have been deterred from applying for employment with the Board because of any racial composition of the Board, or any actual, or reputed discriminatory hiring practices, and this Court finds as a fact and adjudges as a matter of law that there are none.

The named plaintiffs may represent themselves and all blacks who have previously applied for employment with the A&I Board and have been denied such right prior to this date solely because they were and are black.

The decision of the Magistrate is reversed insofar as it is at variance with this order of the Court.

ORDERED, this February 7, A. D., 1979.

/s/ Harold Cox
UNITED STATES DISTRICT JUDGE

APPENDIX D
(Filed June 8, 1979)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. J76-117(C)

BARBARA PHILLIPS, CORNELL GREEN RICE AND MELVIN PHILLIPS

Plaintiffs

v.

STATE OF MISSISSIPPI, MIKE AMIS, DIRECTOR, A&I BOARD, GOVERNOR CLIFF FINCH

Defendants

This suit was instituted against the defendants which charge them with discrimination in employment; and more particularly with not hiring the plaintiffs because they were black. This matter was referred to the United States Magistrate who heard the case in some detail. The Court tentatively agreed to certify a class as follows: "All blacks who have unsuccessfully applied for employment with the board, or all blacks who will in the future apply for employment with the board, or all blacks who have been deterred from applying for employment with the board because of racial composition, or actual or reputed discriminatory hiring practices."

The Magistrate filed an opinion in the form of a Finding of Fact and a Recommendation to this Court on this record dated April 12, 1979. The Magistrate entered his order thereon dated April 30, 1979. On May 10, 1979, the defend-

ants objected to that part of the finding which provided that the board had discriminated against blacks prior to 1973, when at the trial it was stipulated that the first black employee was hired by the board on November 16, 1973.

It is the view of this Court that no litigant is entitled as a matter of law to a perfect trial and that this discrepancy is of no effect in the overall disposition of this case. The plaintiffs on May 10, 1979 filed objections to the Magistrate's Report and Recommendation, and requested the Court to modify the Report and Recommendation consistent with the findings and conclusions handed the Court. There are many objections made by counsel by these advocates after the trial.

This Court has carefully examined the eighty-seven page transcript of all of the testimony taken in this case, and has carefully examined these objections and criticisms and declines the plaintiffs' invitation to modify the Report and Recommendation for the reason that this Court is of the firm conviction on this record that these plaintiffs have simply not made out their claim in any respect. Magistrate Countiss stated: "The Court is of the opinion and so finds that neither the individual nor class plaintiffs have established by a preponderance of the evidence that they were not offered employment with the A&I Board because they were black, or that the hiring policies and practices of the board have a disparate impact upon the population of Mississippi. The Court, therefore, finds for the defendants."

It is noticed that most of the testimony was provided by Attorney Freivogel who was not sworn. It was further noticed by the Court that the hearsay statements of Mr. Freivogel were marked for identification and never entered into evidence.

The Court accepts, adopts and approves the findings and recommendations of the Magistrate, dated April 12, 1979, and this suit is now finally dismissed with prejudice at the cost of the plaintiffs and for which proper process may issue.

ORDERED AND ADJUDGED, this June 8, A.D., 1979.

/s/ Harold Cox
UNITED STATES DISTRICT JUDGE